



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 25, 2019

Ms. Anastasia Broadfoot
Attorney
Office of the General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711-3137

OR2019-05274

Dear Ms. Rowe:

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# 755006 (TABC PIR Reference No. R000433-122018).

The Texas Alcoholic Beverage Commission (the "commission") received a request for specified investigations by the commission's Office of Professional Responsibility. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state release of this information may implicate the interests of the Federal Bureau of Investigation (the "FBI"). Accordingly, you state, and provide documentation showing, you notified the FBI of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the FBI. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See id.*

We note the FBI asserts exceptions to the required public disclosure of information the commission has not submitted for our review. This ruling does not address information beyond what the authority has submitted to us for review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific

information requested). Accordingly, this ruling is limited to the information the commission submitted as responsive to the request for information.¹ *See id.*

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information made confidential by section 5.48 of the Alcoholic Beverage Code, which provides as follows:

(a) “Private records,” as used in this section, means all records of a permittee, licensee, or other person other than the name, proposed location, and type of permit or license sought in an application for an original or renewal permit or license, or in a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or licensee.

(b) The private records of a permittee, licensee, or other person that are required or obtained by the commission or its agents, in connection with an investigation or otherwise, are privileged unless introduced in evidence in a hearing before the commission or before a court in this state or the United States.

Alco. Bev. Code § 5.48. The term “privileged” in this statute has been construed to mean “confidential” for purposes of the Act. Attorney General Opinion JM-1235 at 2 (1990); Open Records Decision Nos. 186 (1978), 62 (1974). Thus, section 5.48 makes confidential any records required or obtained by the commission, with the exception of “the name, proposed location, and type of permit or license sought in an application for an original or renewal permit or license” and “a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or licensee.” Alco. Bev. Code § 5.48.

You assert the submitted information is confidential pursuant to section 5.48. However, upon review, we find you failed to establish the information at issue consists of “private records” of a permittee, licensee, or other person required or obtained by the commission for purposes of section 5.48. Therefore, this information is not confidential under section 5.48 of the Alcoholic Beverage Code, and the commission may not withhold it under section 552.101 of the Government Code on this ground.

Section 552.101 of the Government 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

¹Based on this determination, we need not address the FBI’s arguments against disclosure of this information.

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). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). 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.).

Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision No. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern). Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find some of the submitted information, which we marked and indicated, and the submitted public citizens' dates of birth satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the commission must withhold the information we marked and indicated and the submitted public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned that "vague assertions of risk will not carry the day." *Id.* at 119.

The FBI argues portions of the remaining information should be excepted under the common-law physical safety exception. The FBI states "there is a likelihood that [the individual at issue] may be subject to harassment and retribution" if the information at issue is released. Upon review, however, we find the FBI has failed to demonstrate disclosure of the information at issue would create a substantial threat of physical harm to an individual.

Therefore, the commission may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

We note the remaining information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.² 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). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). Upon review, we find the commission must withhold the employee’s date of birth, which we marked and indicated, under section 552.102(a) of the Government Code.

Next, we note some of the remaining information may be subject to section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer’s home address and telephone number, social security number, emergency contact information, and family member information regardless of whether the peace officer made an election under section 552.024 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. To the extent the individuals at issue are currently licensed peace officers as defined by article 2.12, the commission must withhold the information we marked and indicated under section 552.117(a)(2) of the Government Code.³ Conversely, if the individuals at issue are not currently licensed peace officers, the commission may not withhold the information at issue under section 552.117(a)(2).

If the individuals are not currently licensed peace officers, section 552.117(a)(1) of the Government Code may apply to the information at issue. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of 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). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. If the individuals at

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note the previous determination issued in Open Records Decision No. 670 (2001) authorizes a governmental body to withhold the home addresses and telephone numbers, personal pager and cellular telephone numbers, social security numbers, and family member information of its peace officers under section 552.117(a)(2) without the necessity of requesting an attorney general decision.

issue made a timely election under section 552.024, the commission must withhold the information we marked and indicated under section 552.117(a)(1) of the Government Code. If the individuals did not make timely elections under section 552.024, this information may not be withheld under section 552.117(a)(1).

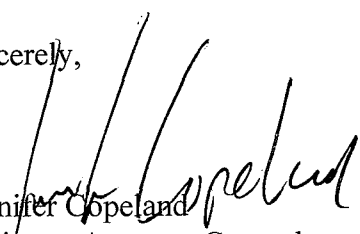
Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's license or driver's license or a motor vehicle title or registration issued by a Texas agency, or an agency of another state or country. *See Gov't Code* § 552.130(a)(1)-(2). Upon review, we find the commission must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

In summary, the commission must withhold the information we marked and indicated and the submitted public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The commission must withhold the employee's date of birth, which we marked and indicated, under section 552.102(a) of the Government Code. To the extent the individuals at issue are currently licensed peace officers as defined by article 2.12, the commission must withhold the information we marked and indicated under section 552.117(a)(2) of the Government Code. If the individuals are not currently licensed peace officers but made timely elections under section 552.024 of the Government Code, the commission must withhold the information we marked and indicated under section 552.117(a)(1) of the Government Code. The commission must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The remaining responsive information must be released.

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,



Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/eb

Ref: ID# 755006

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)