



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 20, 2019

Ms. Myrna S. Reingold
Legal Department
County of Galveston
722 Moody Avenue, 5th Floor
Galveston, Texas 77550

OR2019-13396

Dear Ms. Reingold:

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# 766613.

The Galveston County District Attorney's Office (the "district attorney's office") received two requests from the same requestor for several categories of information pertaining to a named employee.¹ You state the district attorney's office is releasing some information to the requestor. You state the district attorney's office does not have information responsive to a portion of the request.² You indicate the district attorney's office will withhold certain

¹We note the district attorney's office sought and received clarification of the information requested. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

information pursuant to section 552.1175(f) of the Government Code and social security numbers pursuant to section 552.147(b) of the Government Code.³ You claim some of the submitted information is not subject to the Act. You also claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.111, 552.117, 552.130, 552.136, and 552.137 of the Government Code.⁴ We have considered the submitted arguments and reviewed the submitted representative sample of information.⁵

Initially, you assert some of the submitted information is not subject to the Act. The Act is applicable only to “public information.” *See* Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as follows:

In this chapter, “public information” means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

³Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, social security number, date of birth, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure who properly elects to keep this information confidential. *See* Gov’t Code § 552.1175(b), (f). 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 id.* § 552.147(b).

⁴Although you also raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002).

⁵We 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.

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Further, information that is written, produced, collected, assembled, or maintained by an individual officer or employee of a governmental body in the officer's or employee's official capacity may be subject to disclosure under the Act if the information pertains to official business of the governmental body. Gov't Code § 552.002(a)(3). Information is "in connection with the transaction of official business" if it is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on behalf of a governmental body and it pertains to official business of the governmental body. *See id.* § 552.002(a-1). Moreover, section 552.001 of the Act provides it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a).

We further note the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, if the information at issue is related to the district attorney's office's business, the mere fact it is not in the district attorney's office's possession does not remove the information from the scope of the Act. *See* ORD 635 at 6-8 (stating that information maintained on a

privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act).

You assert some of the submitted information consists of communications that solely relate to personal matters of the named district attorney's office employee, and argue this information does not constitute public information since the nature of these communications does not pertain to the transaction of official business of the district attorney's office. Further, you inform us the district attorney's office has a policy that allows for incidental use of e-mail and work telephones, and you state the use of resources to create the information at issue was *de minimis*. See ORD 635 at 7 (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Upon review, we find the information we indicated does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the district attorney's office. See Gov't Code § 552.021. Thus, we conclude the information we indicated is not subject to the Act and need not be released in response to this request.⁶ Further, you state some of the submitted information consists of the named individual's personal cellular telephone records. You state the cellular telephone from which the information at issue was obtained is not paid for by the district attorney's office and the records generated by its use are not maintained with public money. You also assert the information at issue was not collected, assembled, or maintained by or for the district attorney's office. We reiterate information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of a governmental body. See *id.* § 552.002(a). We note portions of the cellular telephone records at issue consist of telephone calls to attorneys and peace officers. We are unable to discern the content of these telephone calls, and are thus unable to determine if the telephone calls were made in the named employee's official capacity and relate to official business of the district attorney's office. Thus, we must rule conditionally with respect to the information at issue. To the extent the information we indicated relates to the named employee's use of his personal cellular telephone and does not consist of official business of the district attorney's office, it is not subject to the Act and the district attorney's office is not required to release it. However, to the extent the information at issue relates to the named employee's use of his personal cellular telephone while conducting the official business of the district attorney's office, it is "public information" subject to the Act and the district attorney's office must release it, unless the information falls within an exception to public disclosure. In that instance, we will address your remaining arguments against disclosure of the information at issue. Additionally, we will consider your arguments against disclosure of the remaining information.

Next, you argue portions of the submitted information are not responsive to the present request for information. We note the submitted information consists of the information specified in the present request. We also note the Act requires a governmental body to make

⁶As we are able to make this determination, we need not address your remaining arguments against disclosure of this information.

a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because you have submitted information for our review and submitted arguments against its disclosure, we find the district attorney's office has made a good-faith effort to submit information that is responsive to the request. Accordingly, we will address your arguments against disclosure of the submitted information.

Section 552.108 of the Government Code provides, in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted [from required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An 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 is excepted [from required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(1), (4), (b)(1), (3). Sections 552.108(a)(4) and (b)(3) protect information that was prepared by an attorney for the state for litigation or that reflects an attorney's legal reasoning. A governmental body claiming an exception to disclosure under section 552.108 must explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977). You state the information you marked reflects the mental impressions or legal reasoning of attorneys representing the state. Upon review, we agree the information at issue reflects the mental processes or legal reasoning of an attorney representing the state and thus subject to sections 552.108(a)(4) and (b)(3) of the Government Code. Accordingly, the district attorney's office may withhold the information you marked under sections 552.108(a)(4) and (b)(3) of the Government Code.⁷

You state the information you marked pertains to pending criminal prosecutions, and release of the information would interfere with the investigation and prosecution of the ongoing cases. Based on these representations, we conclude the release of the information at issue 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 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court notes law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); *see also* Open Records Decision No. 611 (1992). Accordingly, the district attorney's office may withhold the information you marked under section 552.108(a)(1) of the Government Code.⁸

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 Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure “cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” ORD 506 at 2. We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.* You inform us the cellular telephone numbers of law enforcement officers you marked are used to communicate for law enforcement purposes. You assert release of the information at issue would interfere with law enforcement personnel's duties of law enforcement and crime prevention. Based on your representations and our review, we find you have established the release of the information at issue would interfere with law enforcement. Accordingly, the district attorney's office

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁸As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

may withhold the law enforcement officers' cellular telephone numbers you marked under section 552.108(b)(1) of the Government Code.

Section 552.102(a) of the Government Code 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 (Tex. 2010). Accordingly, the district attorney's office must withhold the dates of birth of government employees within the remaining information under section 552.102(a) of the Government Code.⁹

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. This section 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.). Accordingly, the district attorney's office must withhold the dates of birth of public citizens within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) excepts from disclosure the home address and telephone number, 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 of the Government Code. See Gov't Code § 552.117(a)(1). We note section 552.117 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 5-6 (1988) (section 552.117 is not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Accordingly, to the extent the individuals at issue timely requested confidentiality under section 552.024 of the

⁹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Government Code, the district attorney's office must withhold the information you marked and the additional information we marked under section 552.117(a)(1) of the Government Code; however, the district attorney's office may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the district attorney's office may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

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. Accordingly, the district attorney's office must withhold the motor vehicle record information you marked and the additional information we marked 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 id.* § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find the district attorney's office must withhold the personal e-mail addresses you marked and the additional information we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

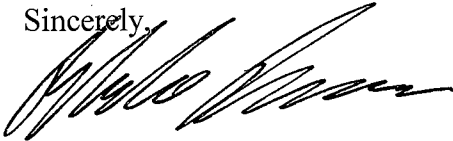
In summary, the information we indicated is not subject to the Act and the district attorney's office need not release it in response to this request. To the extent the information we indicated relates to the named employee's use of his personal cellular telephone and does not consist of official business of the district attorney's office, it is not subject to the Act and the district attorney's office is not required to release it. The district attorney's office may withhold the information you marked under sections 552.108(a)(4) and (b)(3) of the Government Code. The district attorney's office may withhold the information you marked under section 552.108(a)(1) of the Government Code. The district attorney's office may withhold the law enforcement officers' cellular telephone numbers you marked under section 552.108(b)(1) of the Government Code. The district attorney's office must withhold the dates of birth of government employees within the remaining information under section 552.102(a) of the Government Code. The district attorney's office must withhold the dates of birth of public citizens within the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals at issue timely requested confidentiality under section 552.024 of the Government Code, the district attorney's office must withhold the information you marked and the additional information we marked under section 552.117(a)(1) of the Government Code; however, the

district attorney's office may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. The district attorney's office must withhold the motor vehicle record information you marked and the additional information we marked under section 552.130 of the Government Code. The district attorney's office must withhold the personal e-mail addresses you marked and the additional information we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The district attorney'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,



Blake Brennan
Attorney
Open Records Division

BB/gw

Ref: ID# 766613

Enc. Submitted documents

c: Requestor
(w/o enclosures)