



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 7, 2019

Ms. DeAndrea A. Bradford
Assistant City Attorney
Arlington Police Department
Mail Stop 04-0200
P.O. Box 1065
Arlington, Texas 76004-1065

OR2019-21723

Dear Ms. Bradford:

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# 779214 (Police Dept. Ref. No. 80089).

The Arlington Police Department (the "department") received a request for all incident reports related to a specified type of incident during a specified time period, including two specified incidents. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-05873 (2012). In that ruling, we determined the department must: (1) withhold certain information under section 552.101 of the Government Code in conjunction with common-law privacy; (2) withhold certain information under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law; and (3) release the remaining information. 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 such 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 No. 518 at 3 (1989); *see also* Open Records Decision No. 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). Accordingly, pursuant to section 552.007, the department may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise section 552.108 of the Government Code for information that may have been at issue in the previous ruling, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision No. 177 at 3 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, to the extent any portion of the submitted information was previously released in accordance with Open Records Letter No. 2012-05873, the department may not now withhold such information under section 552.108. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2012-05873 was based have changed with respect to the remaining information at issue. Therefore, the department must continue to rely on that ruling as a previous determination and withhold or release any identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will address your argument under section 552.108 for any information not previously ordered released.

Next, we note the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-09564 (2012). In Open Records Letter No. 2012-09564, we determined, with the exception of basic information, the City of Arlington may withhold certain information under section 552.108(a)(1) of the Government Code and certain information under section 552.108(a)(2) of the Government Code. With respect to the information subject to section 552.108(a)(2), we have no indication there has been any change in the law, facts, or circumstances on which the prior ruling was based. Accordingly, except for any information which was previously released in accordance with Open Records Letter No. 2012-05873, we conclude the department may rely on Open Records Letter No. 2012-09564 as a previous determination and withhold or release the information we found subject to section 552.108(a)(2) of the Government Code in Open Records Letter No. 2012-09564 in accordance with that ruling. *See* ORD 673. However, you only claim section 552.108(a)(2) for the submitted information. Thus, with respect to any identical information we found was subject to section 552.108(a)(1) of the Government Code in Open Records Letter No. 2012-09564, we find the circumstances have changed and the department may not rely on Open Records Letter No. 2012-09564 as a previous determination for this information. *See id.* Accordingly, we will address your argument against the disclosure of this information, to the extent it is responsive to the instant request.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred

adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state the submitted information pertains to investigations which were "presented to the grand jury and no billed." However, you state "[t]he statute of limitations has not run, and while unlikely, the case could be re-presented to the grand jury at any time." You further acknowledge some of the submitted information relates to offenses which resulted in convictions or deferred adjudications. Based on your representations and our review of the information at issue, we find you have failed to demonstrate how the information at issue pertains to criminal cases that concluded in a final result other than conviction or deferred adjudication. Therefore, we find you have failed to demonstrate the applicability of section 552.108(a)(2) to the information at issue, and the department may not withhold the information at issue on that basis. *See id.* § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

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.¹ *Id.* § 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). Thus, to the extent the information we have marked relates to a licensed peace officer who elects to restrict access to his information in accordance with section 552.1175(b), it must be withheld from disclosure under section 552.1175 of the Government Code. If the individual whose information is at issue is not currently a licensed peace officer or does not elect to restrict access to the information in accordance with section 552.1175(b), the marked information may not be withheld under section 552.1175 of the Government Code.

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.). However, the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to a deceased individual. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 147

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).

(N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded” (quoting RESTATEMENT (SECOND) OF TORTS § 652I (1977))); Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. Further, we note the information at issue contains dates of birth of public citizens who may have been de-identified under section 552.1175 and whose privacy interests are thus protected. Accordingly, the department may not withhold the dates of birth of individuals who have been de-identified under section 552.101 on the basis of common-law privacy. Therefore, the department must withhold all living, identifiable public citizens’ dates of birth under section 552.101 of the Government Code 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. Accordingly, the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, the department must continue to rely on Open Records Letter No. 2012-05873 as a previous determination and withhold or release any identical information in accordance with that ruling. To the extent the information was not previously released in Open Records Letter No. 2012-05873, the department may rely on Open Records Letter No. 2012-09564 as a previous determination and withhold or release the information we found subject to section 552.108(a)(2) of the Government Code in Open Records Letter No. 2012-09564 in accordance with that ruling. To the extent the information we have marked relates to a licensed peace officer who elects to restrict access to his information in accordance with section 552.1175(b) of the Government Code, the marked information must be withheld from disclosure under section 552.1175 of the Government Code. The department must withhold all living, identifiable public citizens’ dates of birth 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 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open

Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Neal". The signature is fluid and cursive, with the first name "Tim" being more prominent than the last name "Neal".

Tim Neal
Assistant Attorney General
Open Records Division

TN/mo

Ref: ID# 779214

Enc. Submitted documents

c: Requestor
(w/o enclosures)