



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 2, 2019

Mr. Oscar G. Gabaldon, Jr.
Assistant City Attorney
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890

OR2019-27672

Dear Mr. Gabaldon:

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# 788770 (City's Reference: # 19-1026-10601).

The City of El Paso (the "city") received a request for a specified internal affairs investigation. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

¹Although you also raise section 552.101 of the Government Code in conjunction with a statutory grant of confidentiality and a judicial grant of confidentiality, you provide no arguments explaining how these arguments apply to the information at issue. Therefore, we assume you no longer assert these arguments. *See* Gov't Code §§ 552.301, .302.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation made by the city's police department (the "department"). Therefore, the city must release this information under section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. Although the city raises section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the submitted information may be withheld under section 552.103. However, as sections 552.101, 552.102, 552.117, 552.1175, and 552.130 of the Government Code apply to confidential information, we will address the applicability of these sections to the information at issue.²

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 of the Government Code also encompasses information that is made confidential by section 261.201(a) of the Family Code, which provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we find the information we marked was used or developed in investigations of alleged or suspected child abuse or neglect. *See id.* §§ 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining "abuse" and "neglect" for purposes of

²The 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).

chapter 261 of the Family Code). Thus, based on our review, we find the information we marked is within the scope of section 261.201 of the Family Code. We have no indication the city has adopted a rule that governs the release of this type of information. Therefore, we assume no such regulation exists. Given that assumption, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

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 has 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). Upon review, we find the city must withhold the date of birth we marked section 552.102(a) of the Government Code.

Section 552.101 of the Government Code also 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 Third 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.). We note the requestor has a right of access to his own date of birth. *See* Gov’t Code § 552.023 (a) (governmental body may not deny access to person to whom information relates or person’s agent on ground that information is considered confidential by privacy principles); ORD 481 at 4 (privacy theories not implicated when individuals request information concerning themselves). Thus, with the exception of the requestor’s date of birth, the city must withhold all public citizens’ dates of birth, which we indicated, under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* 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. Accordingly, the city must withhold the information we marked under section 552.117(a)(2) of the Government Code.

Section 552.1175 of the Government Code excepts from disclosure 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

“criminal investigators of the United States as described by article 2.122(a) Code of Criminal Procedure [.]” *Id.* § 552.1175(a)(7). Upon review, we find some of the remaining information, which we marked, pertains to a Federal Bureau of Investigation agent and a United States Border Patrol agent that is held by the city in a non-employment capacity. Thus, if the agents at issue are criminal investigators of the United States as described by article 2.122(a) of the Code of Criminal Procedure and elect to restrict access to their information in accordance with section 552.1175(b), then the city must withhold the information we marked under section 552.1175. However, if the agents are not criminal investigators of the United States as described by article 2.122(a) or if they do not elect to restrict access to their information in accordance with section 552.1175(b), then the city may not withhold this information under section 552.1175.

Section 552.130 of the Government Code excepts from public disclosure 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. *See id.* § 552.130. We note section 552.130 protects personal privacy. Thus, the requestor has a right of access to his motor vehicle record information under section 552.023 of the Government Code and it may not be withheld under section 552.130. *See id.* § 552.023(a); ORD 481 at 4. However, because we are unable to determine whether the information at issue belongs to the requestor’s client, we must rule conditionally. To the extent the motor vehicle record information we marked and indicated belongs to the requestor, the city must release it under section 552.023 of the Government Code. To the extent the motor vehicle record information we marked and indicated does not belong to the requestor, the city must withhold it under section 552.130 of the Government Code.

In summary, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The city must withhold the date of birth we marked section 552.102(a) of the Government Code. With the exception of the requestor’s date of birth, the city must withhold all public citizens’ dates of birth, which we indicated, under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we marked under section 552.117(a)(2) of the Government Code. To the extent the information we marked pertains to criminal investigators of the United States as described by article 2.122(a) of the Code of Criminal Procedure and the agents elect to restrict access to their information in accordance with section 552.1175(b), the city must withhold the information we marked under section 552.1175 of the Government Code. To the extent the motor vehicle record information we marked and indicated does not belong to the requestor, the city must withhold it under section 552.130 of the Government Code. The city must release the remaining information.³

³ We note the remaining information includes social security numbers. Section 552.147(b) of the Government Code authorizes a government body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147(b). Additionally, we note the requestor has a right of access to some of the information being released. *See* Gov’t Code § 552.023(a); ORD 481 at 4. Thus, if the city receives another request for the same information from a different requestor, the city must again seek a decision from this office.

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,



D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/jxd

Ref: ID# 788770

Enc. Submitted documents

c: Requestor
(w/o enclosures)