



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 20, 2019

Mr. Adam Bitter
General Counsel
Office of the Texas Secretary of State
P.O. Box 12697
Austin, Texas 78711-2697

OR2019-32866

Dear Mr. Bitter:

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# 797856 (ORR# 19-0902).

The Office of the Texas Secretary of State (the "secretary of state's office") received a request for communications between named individuals and specified entities during a specified time period. The secretary of state's office states it is withholding certain information pursuant to Open Records Decision No. 684 (2009).¹ The secretary of state's office claims the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. Additionally, the secretary of state's office provides documentation showing it has notified the Office of the Attorney General (the "OAG") and the Dallas County District Attorney's Office (the "district attorney's office") of the right to submit comments to this office 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 OAG.² We have

¹ Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

² As of the date of this letter, this office has not received comments from the district attorney's office explaining why the information at issue should not be released.

considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, the secretary of state's office states some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2019-16013 (2019), 2019-13766 (2019), and 2019-13667 (2019). We also note some of the submitted information may have been the subject of Open Records Letter No. 2019-16346 (2019). In Open Records Letter Nos. 2019-13766 and 2019-13667, we determined the secretary of state's office must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code. In Open Records Letter Nos. 2019-16013 and 2019-16346, we held the secretary of state's office may withhold the information at issue under section 552.108(a)(1) of the Government Code on behalf of the OAG. The OAG informs us there has been no change in the law, facts, or circumstances with respect to most of the information on which the previous rulings were based. Accordingly, with the respect to the information for which the law, facts, and circumstances have not changed, the secretary of state's office may rely on Open Records Letter Nos. 2019-16013, 2019-13766, 2019-13667, and 2019-16346 as previous determinations and withhold the information at issue in accordance with those rulings. *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, the OAG informs us the law, facts, and circumstances have changed with respect to some of the information that was subject to the prior rulings. Further, the remaining information was created after the date the secretary of state's office received the most recent request for information at issue in the prior rulings. Therefore, the remaining information is not the subject of the prior rulings and the secretary of state's office may not withhold it under those previous determinations. Accordingly we will consider the submitted arguments against this information.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* 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. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Section 552.108 may be invoked by the proper custodian of information relating to a closed investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency has

³ We 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.

custody of information that would otherwise qualify for exception under section 552.108 as information relating to a case of a law enforcement agency, the custodian of the records may withhold the information if the law enforcement agency that wishes to have the information withheld provides this office with a demonstration the information relates to the case and demonstrates it wishes to have the information withheld. In this instance, the OAG informs us the information at issue, which we marked, relates to a closed criminal investigation that did not result in conviction or deferred adjudication. Further, the OAG indicates it wishes to have the information withheld under section 552.108(a)(2) of the Government Code. Thus, the secretary of state's office may withhold the information we marked under section 552.108(a)(2) of the Government Code on behalf of the OAG.

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 encompasses section 32.076 of the Election Code, which provides as follows:

(a) Except as provided by Subsection (b), an e-mail address or personal phone number of an election judge or clerk collected or maintained by the authority conducting the election is confidential and does not constitute public information for purposes of [the Act],

(b) An e-mail address or phone number described by Subsection (a) shall be made available on request to:

(1) any entity eligible to submit lists of election judges or clerks for that election; or

(2) the state executive committee of a political party with a county chair eligible to submit lists of election judges or clerks for that election.

Elec. Code § 32.076. Upon review, we find the information the secretary of state's office marked consists of e-mail addresses and personal phone numbers of election judges or clerks collected or maintained by the authority conducting the election. Further, we find none of the exceptions in section 32.076(b) apply in this instance. Therefore, the secretary of state's office must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 32.076 of the Election 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. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied)

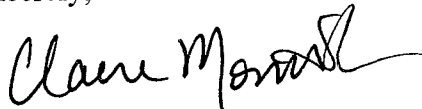
(mem. op.). Thus, the secretary of state's office must withhold the public citizens' dates of birth it marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, with the respect to the information for which the law, facts, and circumstances have not changed, the secretary of state's office may rely on Open Records Letter Nos. 2019-16013, 2019-13766, 2019-13667, and 2019-16346 as previous determinations and withhold the information at issue in accordance with those rulings. The secretary of state's office may withhold the information we marked under section 552.108(a)(2) of the Government Code on behalf of the OAG. The secretary of state's office must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 32.076 of the Election Code. The secretary of state's office must withhold the public citizens' dates of birth it marked under section 552.101 of the Government Code in conjunction with common-law privacy. The secretary of state'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 <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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/eb

Ref: ID# 797856

Enc. Submitted documents

c: Requestor
(w/o enclosures)