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ATTORNEY GENERAL OF TEXAS

March 17, 2020

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OR2020-08412

Dear Mr. Davis:

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# 816896.

Rusk County (the "county"), which you represent, received a request for three named employees' e-mails and texts during a certain date range, training and discipline records for a named employee, specified employee information, cell phone usage policies, and information related to active missing persons cases.¹ You state the county does not possess some of the requested information.² You state the county has released some information. You claim a portion of the submitted information is not subject to the Act. You also claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, 552.117, 552.1175, 552.127, 552.130, 552.136, 552.137,

¹ You state the county sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² The Act does not require a governmental body to create or release information that did not exist when a request for information was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

552.138, 552.139, 552.1425, 552.147, 552.148, and 552.152 of the Government Code.³ We have considered your arguments and reviewed the submitted representative sample of information.⁴

Initially, you assert the requestor has asked the county to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* ORDs 563 at 8, 555 at 1-2. However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume the county has made a good faith effort to do so.

Next, we note some of the submitted information, which we marked, is not responsive to the instant request for information because it was generated outside the date range specified in the current request. *See Bustamante*, 562 S.W.2d at 266; ORDs 605 at 2, 563 at 8, 555 at 1-2, 452 at 3, 362 at 2. This ruling does not address the public availability of any information that is not responsive to the request and the county is not required to release such information in response to this request.⁵

Next, you argue some of the responsive information is not “public information” subject to disclosure under the Act. Section 552.002(a) of the Government Code defines “public information” as 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

³ Although you also raise sections 552.103 and 552.111 of the Government Code, you provide no arguments explaining how these exceptions are applicable to the information at issue. Therefore, we assume you no longer assert these exceptions. *See* Gov’t Code §§ 552.301, .302.

⁴ 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.

⁵ As we are able to make this determination, we need not address your arguments against disclosure of this information.

(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.

Gov't Code § 552.002(a). Information is "in connection with the transaction of official business" if it 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 government 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). You argue the information you indicated is not subject to the Act because it is purely personal in nature and not associated with business of the county. However, upon review, we find the county maintains the information at issue in connection with the transaction of its official business. Thus, the information constitutes "public information" as defined by section 552.002(a). Accordingly, the information at issue is subject to the Act in its entirety and the county must release it, unless it falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302.

Next, we note some of the responsive information consists of a grand jury list. The judiciary is expressly excluded from the requirements of the Act. *Id.* § 552.003(1)(B). This office has determined for purposes of the Act, a grand jury is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean such information is in the grand jury's constructive possession when the same information also is held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Thus, to the extent the county holds the grand jury list solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act, and the county is not required to release that information in response to the instant request. To the extent the county holds the information at issue in its own capacity and not solely as an agent of the grand jury, we will address your arguments against its disclosure.

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 information made confidential by other statutes, such as section 261.201 of the Family Code, which provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act], 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 an investigation conducted under chapter 261 of the Family Code, so as to fall within the scope of section 261.201(a). *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of section 261.201 of Family Code). You have not indicated the county has adopted a rule governing the release of this type of information. Therefore, we assume no such regulation exists. Given that assumption, we conclude the information we marked is confidential under section 261.201 of the Family Code, and the county must withhold it under section 552.101 of the Government Code.⁶ However, you have not demonstrated any portion of the remaining responsive information was used or developed in an investigation conducted under chapter 261 of the Family Code. Therefore, the county may not withhold any portion of the remaining responsive information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders federal tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, the submitted 1099-MISC form, which we marked, constitutes tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the

⁶ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state a portion of the remaining responsive information consists of communications involving attorneys for the county and county employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the county. You state these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the county may withhold the information you indicated under section 552.107(1) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), 301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state a portion of the remaining

responsive information pertains to active criminal investigations or prosecutions. Based on this representation, 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 delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information at issue. Thus, the county may withhold the responsive information we marked under section 552.108(a)(1) of the Government Code.⁷

Section 552.101 of the Government Code 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 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). The doctrine of common-law privacy protects a compilation of an individual's criminal history, which is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. Cf. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. 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.).

Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the county must withhold the information we marked and all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.⁸

You also raise section 552.101 of the Government Code in conjunction with the common-law informer's privilege, which Texas courts have long recognized. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. See Open Records Decision No. 208 at 1-2 (1978). The informer's privilege protects the identities of

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

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individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981) (*citing* 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988).

You state portions of the remaining responsive information identify complainants who reported violations of law to the county. However, we find you have not demonstrated the information at issue identifies individuals who reported a criminal violation to the county for purposes of the informer’s privilege. Accordingly, the county may not withhold any of the remaining responsive information under section 552.101 on that basis.

Section 552.117(a)(2) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 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. We note section 552.117 encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We have marked information under section 552.117 that consists of the personal information of individuals who were employed by the county and the information is held in the employment context. In this instance, however, it is unclear whether the individuals whose information is at issue are currently-licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, to the extent the individuals whose information is at issue are currently-licensed peace officers as defined by article 2.12, the county must withhold the information we marked under section 552.117(a)(2) of the Government Code, however, the county may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. Conversely, if the individuals whose information is at issue are not currently-licensed peace officers as defined by article 2.12, the information we indicated may not be withheld under section 552.117(a)(2) of the Government Code.

If the individuals whose information is at issue are not currently-licensed peace officers, then the information we indicated may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). As noted above, section 552.117 encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* ORD 506 at 5-6. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See*

Open Records Decision No. 530 at 5 (1989). Therefore, the county may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the individuals whose information we indicated are not currently-licensed peace officers, but timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we marked under section 552.117(a)(1) of the Government Code, however, the county 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 county may not withhold the information we marked under section 552.117(a)(1).

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. Gov't Code § 552.1175. Upon review, we find the information we marked consists of personal information of an individual who may be among the types of individuals listed in section 552.1175(a). Thus, if the information we marked relates to an individual to whom section 552.1175(a) applies, the county must withhold the information we marked under section 552.1175 of the Government Code if the individual at issue elects to restrict access to this information in accordance with section 552.1175(b). However, if the individual at issue is not an individual to whom section 552.1175(a) applies or the individual does not elect to restrict access to this information in accordance with section 552.1175(b), then the county may not withhold this information under section 552.1175 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 id.* § 552.130. Accordingly, the county must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the county must withhold the information we marked under section 552.136 of the Government Code. However, we find you have not demonstrated any of the remaining responsive information consists of a credit card, debit card, or charge card number, or is an access device number used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, we find the county may not withhold any of the remaining responsive information under section 552.136.

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). *Id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Accordingly, the county must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

Section 552.139 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

Id. § 552.139(a). Section 2059.055(b)(1) of the Government Code provides "Network security information is confidential under this section if the information is: (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a governmental entity[.]" *Id.* § 2059.055(b)(1). You state a portion of the remaining responsive information is related to computer security, infrastructure, or passwords. Based upon your arguments and our review of the information, we find the information at issue relates to computer network security. Accordingly, the county must withhold the information we marked under section 552.139 of the Government Code.

In summary, to the extent the county holds the grand jury list solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act, and the county is not required to release that information in response to the instant request. The county must withhold the information we marked under section 261.201 of the Family Code in conjunction with section 552.101 of the Government Code. The county must withhold the submitted 1099-MISC form, which we marked, under section 6103(a) of title 26 of the United States Code in conjunction with section 552.101 of the Government Code. The county may withhold the information you indicated under section 552.107(1) of the Government Code. The county may withhold the remaining responsive information we marked under section 552.108(a)(1) of the Government Code. The county must withhold the information we marked and all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals whose information is at issue are currently-licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, the county must withhold the information we marked under section 552.117(a)(2) of the Government Code, however, the county may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. To the extent the individuals whose information we marked are not currently-licensed peace officers, but timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we marked under section 552.117(a)(1) of the Government Code, however, the county may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. If the information we marked relates to an individual to whom section 552.1175(a) of the Government Code applies, the

county must withhold the information we marked under section 552.1175 of the Government Code if the individual at issue elects to restrict access to this information in accordance with section 552.1175(b). The county must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The county must withhold the information we marked under section 552.136 of the Government Code. The county must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The county must withhold the information we marked under section 552.139 of the Government Code. The county must release the remaining responsive 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,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/rm

Ref: ID# 816896

Enc. Submitted documents

c: Requestor
(w/o enclosures)