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ATTORNEY GENERAL OF TEXAS

April 13, 2022

Ms. Sarah E. Alexander
Open Records Coordinator
Texas Military Department
P.O. Box 5218
Austin, Texas 78763-5218

OR2022-10911

Dear Ms. Alexander:

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# 939043 (Reference No. T22-27).

The Texas Military Department (the "department") received a request for certain information regarding deaths of certain individuals, including reports regarding the deaths of four named individuals. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.117 of the Government Code. Additionally, you state the department notified interested third parties of the right to submit comments to this office explaining why the information at issue should not be released.¹ *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the claimed exceptions and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses section 437.232 of the Government Code, which provides, as follows:

¹ As of the date of this letter, we have not received comments from any interested third party.

(a) In this section, “military personnel information” means a service member’s name, home address, rank, official title, pay rate or grade, state active duty orders, deployment locations, military duty addresses, awards and decorations, length of military service, and medical records.

(b) A service member’s military personnel information is confidential and not subject to disclosure under Chapter 552.

Id. § 437.232. Upon review, we find the submitted information contains military personnel information maintained by the Texas military forces. *See id.* § 437.001(8) (providing “service member” for purposes of chapter 437 means a member or former member of the state military forces or a component of the United States armed forces, including a reserve component), (13) (providing the department is the state agency charged with administrative activities in support of the Texas military forces), (14) (providing that “Texas military forces” for purposes of chapter 437 means the Texas National Guard, the Texas State Guard, and any other military forces under state law). Accordingly, the department must withhold the state active duty orders we marked and the names of the service members at issue, their home addresses, ranks, official titles, pay rates or grades, deployment locations, military duty addresses, awards and decorations, and lengths of military service under section 552.101 in conjunction with section 437.232.² However, we find you have failed to demonstrate the remaining information consists of military personnel information that is subject to section 437.232. Therefore, the department may not withhold the remaining information under section 552.101 on that basis.

Section 552.117(a)(11) of the Government Code applies to records a governmental body holds in an employment capacity and, in relevant part, excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former member of the Texas military forces who requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(11). Section 552.117(a)(11) applies, in part, to the Texas military forces as that term is defined by section 437.001 of the Government Code. *Id.* § 437.001. We note, for purposes of section 552.117, “family member” means a spouse, minor child, or adult child who resides in the person’s home. *Id.* § 552.117(c) (providing “family member” has meaning assigned by Fin. Code § 31.006(d)). Additionally, we note section 552.117 is also applicable to a personal cellular telephone number, 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 not applicable to cellular telephone

² As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(11) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department must withhold information under section 552.117 on behalf of a current or former member of the Texas military forces only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

Most of the information at issue pertains to deceased individuals. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the department must withhold the information we have marked under section 552.117(a)(11), including the personal cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. We note the protection afforded by section 552.117 generally does not lapse at death, as it is intended to protect the privacy of both the individual and the individual's family members. However, because the protection of social security numbers under section 552.117 is intended solely to protect the privacy of the individual, we note this protection lapses at death and that information may not be withheld under section 552.117. *See 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.); Open Records Decision No. 272 at 1 (1981). Additionally, we find the remaining information is not information subject to section 552.117. Thus, the department may not withhold the remaining information on that basis.

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 or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Additionally, 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.). The common-law right to privacy, however, is a personal right that “terminates upon the death of the person whose privacy is invaded[.]” *See Moore*, 589 S.W.2d at 491; ORD 272 at 1.

Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. The remaining information also includes dates of birth of living individuals. The department must generally withhold the information we marked and the dates of birth in the remaining information that pertain to living, identified individuals under section 552.101 in conjunction with common-law privacy.³ However, we note the information we marked and one date of birth pertains to living individuals who may be de-identified pursuant to section 552.117 of the Government Code; thus, in that instance, their privacy interests are protected, and the department may not withhold the information we marked and the date of birth pertaining to the de-identified individuals under section 552.101 in conjunction with common-law privacy.

We note portions of the remaining information are subject to section 552.130 of the Government Code.⁴ Section 552.130 provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. Gov't Code § 552.130(a). However, section 552.130 is designed to protect the privacy of individuals and, as previously noted, the right to privacy expires at death. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1. Upon review, we conclude the department must withhold the information we marked under section 552.130.⁵

Section 552.101 of the Government Code also encompasses information protected by chapter 418 of the Government Code. As part of the Texas Homeland Security Act (the "HSA"), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. Section 418.176(a) of the Government Code provides, in relevant part, the following:

Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

³ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁴ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]

(2) relates to a tactical plan of the provider[.]

Gov't Code § 418.176(a)(1)-(2). Section 418.177 of the Government Code provides the following:

Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Upon review of your arguments and the information at issue, we find you have failed to demonstrate the applicability of section 418.176 or section 418.177 to the remaining information. Accordingly, the department may not withhold the remaining information under section 552.101 on either of those bases.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n 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 . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” *Id.* § 552.108(b)(1). 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.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

Upon review of your arguments and the information at issue, we find you have failed to demonstrate how any of the remaining information would interfere with law enforcement or crime prevention. Consequently, the department may not withhold the remaining information under section 552.108(b)(1).

In summary, the department must withhold (1) the state active duty orders we marked and the names of service members, their home addresses, ranks, official titles, pay rates or grades, deployment locations, military duty addresses, awards and decorations, and lengths of military service under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code; (2) the information we marked under section 552.117(a)(11) of the Government Code, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, including the personal cellular telephone numbers if the cellular telephone service is not paid for by a governmental body; (3) the information we marked and the dates of birth in the remaining information that pertain to living, identified individuals under section 552.101 of the Government Code in conjunction with common-law privacy; and (4) the information we 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,

James M. Graham
Assistant Attorney General
Open Records Division

JMG/jxd

Ref: ID# 939043

Enc. Submitted documents

c: Requestor
(w/o enclosures)