



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 13, 2022

Mr. Brian Sears
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2022-13874

Dear Mr. Sears:

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# 947173 (PIR 22-0496).

The Texas Department of Public Safety (the "department") received a request for e-mails sent or received by a specified e-mail address containing specified terms during a stated period of time. You state the department has released some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code.¹ Additionally, you state release of some of the submitted information may implicate the interests of the Midland County District Attorney's Office (the "district attorney's office"). Accordingly, you state, and provide documentation showing, the department notified the district attorney's office of the request for information and of its right to submit arguments to this office.² *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹ Although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

² As of the date of this letter, we have not received comments from the district attorney's office.

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.

Section 552.108(b)(1) of the Government Code exempts 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). This section 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.). Rather than merely making a conclusory assertion that releasing the information would interfere with law enforcement, the governmental body claiming section 552.108(b)(1) 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)(1) exempts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Record Decision No. 252 (1980) (section 552.108 designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment). However, section 552.108(b)(1) is not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (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).

You state release of the information you indicated “would provide wrong-doers, drug traffickers, terrorists, and other criminals with invaluable information concerning how [d]epartment investigations and/or operations are planned, implemented[,] and staffed[;] the techniques used to investigate and detect activities of suspected criminal elements; how information is assessed and analyzed; and the lessons learned from the analysis of prior criminal activities.” You also state the information at issue reveals “response capabilities” of the department, the release of which “will compromise law enforcement purposes by enabling terrorists and criminals to anticipate weakness[es] in law enforcement procedures and alter their methods of operation in order to avoid detection and apprehension.” Based upon your representations and our review, we find you have demonstrated release of the information at issue would interfere with law enforcement. Accordingly, the department may withhold the information you indicated under section 552.108(b)(1) of the Government Code.⁴

Section 552.107(1) of the Government Code protects information coming within the 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. ORD 676 at 6-7. 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

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 assert the information you marked and indicated consists of privileged communications between department attorneys, department employees in their capacities as clients, and other privileged parties. You state these communications were made in furtherance of the rendition of professional legal services to the department. Further, you state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the department may withhold the information you marked and indicated under section 552.107 of the Government Code.⁵

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 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.).

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

Accordingly, the department must withhold the date of birth we have marked 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 current or honorably retired peace officer, as well as information that reveals whether the current or honorably retired peace officer has family members, regardless of whether the current or honorably retired peace officer complies with sections 552.024 and 552.1175 of the Government Code.⁶ *See* Gov't Code § 552.117(a)(2); *see also id.* § 552.003(1-b) (defining "honorably retired" for purposes of the Act). We note section 552.117 encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, if a governmental body does not pay for the cellular telephone service, then the department must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code.

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. We note "family member" means a spouse, minor child, or adult child who resides in the person's home. *Cf. id.* § 552.117(c) (providing that "family member" has meaning assigned by Fin. Code § 31.006(d)). Section 552.1175 applies, in part, to "current or honorably retired peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1); *see id.* § 552.003(1-b) (defining "honorably retired" for purposes of the Act). The remaining information contains information that may be subject to section 552.1175. Accordingly, if the individual to whom the marked information relates elects to restrict access to his information in accordance with section 552.1175(b) of the Government Code, then the department must withhold the information we have marked under section 552.1175 of the Government Code.

In summary, the department may withhold the information you indicated under section 552.108(b)(1) of the Government Code. The department may withhold the information you marked and indicated under section 552.107 of the Government Code. The department must withhold the date of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If a governmental body does not pay for the cellular telephone service, then the department must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code. If the individual to whom the marked information relates elects to restrict access to his information in accordance with section 552.1175(b) of the Government Code, then the

⁶ The 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).

department must withhold the information we have marked under section 552.1175 of the Government Code. The department must release the remaining information.⁷

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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/mo

Ref: ID# 947173

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Third Party
(w/o enclosures)

⁷ We note the remaining information includes a social security number. Section 552.147(b) of the Government Code authorizes a governmental 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).