



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 17, 2022

Mr. Kevin Bailey
Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79701

OR2022-24495

Dear Mr. Bailey:

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# 966579 (Ref. No. M037299-051922).

The Midland Police Department (the "department") received a request for information pertaining to a specified incident involving a named individual. You claim some of the submitted information is not responsive. You also claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, the department argues some of the submitted information is not responsive to the instant request for information. Upon review, we find the entirety of the submitted information is responsive to the request. Accordingly, we will consider the public availability of the information at issue.

Next, we address your contention that article 15.26 of the Code of Criminal Procedure does not make the submitted probable cause affidavit expressly public. Article 15.26 of the Code of Criminal Procedure provides, in relevant part, as follows:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours.

Crim. Proc. Code art. 15.26. Thus, we interpret article 15.26 of the Code of Criminal Procedure to apply only to court clerks. Therefore, we find article 15.26 does not make the probable cause affidavit maintained by the department expressly public. Accordingly, we will address your arguments against disclosure of the information at issue.

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.” Gov’t Code § 552.101. Section 552.101 encompasses 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. This office has found a compilation of an individual’s criminal history 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) (finding significant privacy interest in compilation of individual’s criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. However, information that refers to an individual solely as a victim, witness, or involved person is not part of a compilation of the individual’s criminal history and may not be withheld under section 552.101 on that basis.

We understand you to assert the present request seeks all records pertaining to the named individual. However, we find the requestor seeks information pertaining to a specified incident involving the named individual. Because the requestor specifically asks for this information, it is not part of a compilation of the named individual’s criminal history. Thus, this information is not confidential under common-law privacy as a compilation of criminal history, and the department may not withhold it under section 552.101 of the Government Code on that basis. Therefore, we will address your remaining arguments against disclosure of this information.

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 submitted information pertains to a pending criminal investigation or prosecution. We note, however, the information at issue includes a DIC-24 Statutory Warning and a DIC-25 Notice of Suspension. Because this information has previously been released to the arrestee, we find the department has not shown release of the documents will interfere with the detection, investigation, or prosecution of crime. *See Gov’t Code § 552.108(a)(1)*. Nevertheless, upon review, we conclude the release of the remaining 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 remaining information at issue.

However, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic “front-page” information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-187; see also Open Records Decision No. 127 (1976) (summarizing types of information considered basic information). Accordingly, with the exception of the DIC-24 form, the DIC-25 form, and basic information, which generally must be released, the department may generally withhold the submitted information under section 552.108(a)(1) of the Government Code.¹

However, we note the requestor is a representative of the Federal Bureau of Investigation’s National Instant Criminal Background Check System (“FBI”) and has a right of access to some of the information at issue. Section 411.089(a) of the Government Code provides a criminal justice agency is entitled to obtain from the Texas Department of Public Safety (“DPS”) any criminal history record information (“CHRI”) maintained by the DPS about a person. See Gov’t Code § 411.089(a); see also *id.* § 411.083(b)(1) (DPS shall grant criminal justice agencies access to CHRI). In addition, section 411.087(a) of the Government Code provides, in part:

(a) [A] person, agency, department, political subdivision, or other entity that is authorized by this subchapter or Subchapter E-1 to obtain from [DPS] CHRI maintained by [DPS] that relates to another person is authorized to:

...

(2) obtain from any other criminal justice agency in this state [CHRI] maintained by that criminal justice agency that relates to that person.

Id. § 411.087(a)(2). We note CHRI is defined as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” See *id.* § 411.082(2). A criminal justice agency that receives CHRI from another criminal justice agency pursuant to section 411.087(a)(2) may only receive such information for a criminal justice purpose. See *id.* §§ 411.083(c), .087(b); see also Open Records Decision No. 655 (1997) (discussing limitations on release of CHRI). Section 411.082 defines a “criminal justice agency” as including “a federal or state agency that is engaged in the administration of criminal justice under a statute or executive order and that allocates a substantial portion of its annual budget to the administration of criminal justice[.]” Gov’t Code § 411.082(3)(A). “Administration of criminal justice” has the meaning assigned by article 66.001 of the Code of Criminal Procedure. See *id.*

¹ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

§ 411.082(1). Article 66.001 of the Code of Criminal Procedure defines “[a]dministration of criminal justice” as the “detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of an offender. The term includes criminal identification activities and the collection, storage, and dissemination of [CHRI].” Crim. Proc. Code art. 66.001(1).

We understand the FBI is engaged in the administration of criminal justice under chapter 411 of the Government Code. Further, we understand the FBI intends to use the CHRI for a criminal justice purpose. Consequently, we conclude the department must make available to the requestor information pertaining to the named individual that shows the type of allegation made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions. *See* ORD 451.

As noted above, section 552.101 of the Government Code encompasses the doctrine of common-law privacy. *Indus. Found.*, 540 S.W.2d at 685. 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 department must withhold the public citizen’s date of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state or another state or country is excepted from public release.² Gov’t Code § 552.130. Accordingly, the department must withhold the information we marked under section 552.130 of the Government Code.

In summary, the department must release the CHRI pertaining to the named individual to this requestor pursuant to section 411.087(a)(2) of the Government Code. With the exception of the DIC-24 form, the DIC-25 form, and basic information, which must be released, the department may withhold the submitted information under section 552.108(a)(1) of the Government Code. In releasing the DIC-24 form and the DIC-25 form, the department must withhold the public citizen’s date of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the motor vehicle information we marked under section 552.130 of the Government Code.

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.

² 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).

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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/jxd

Ref: ID# 966579

Enc. Submitted documents

c: Requestor
(w/o enclosures)