

Message

From: Gordon, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1DE49522ABF0469A902DD47432537850-JDG1]
Sent: 5/20/2020 5:23:09 PM
To: Vassar, Ryan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5ed8322c27d7435399a69196478d7123-RMV3]
Subject: DPS Drafts
Attachments: Ruling Draft - ID# 828822 - Closed Litigation Version.docx; Ruling Draft - ID# 828822 - Pour Out Version.docx

Ryan, I have attached the two drafts you requested. The first draft is a general pour out for both the DPS and FBI arguments.

The second draft declines to rule based on the pending litigation filed against DPS by the requestor. This second draft includes a note that the determination would run up against the formal decision we issued in ORD 687.

Link to ORD 687: <https://www.texasattorneygeneral.gov/sites/default/files/ord-files/ord/2020/ord20110687.pdf>

For additional background, here is a link to the State Securities Board ruling involving the same FBI investigation. <https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2019/pdf/or201933291.pdf>

In that ruling we also received FBI comments and concluded that the FBI may withhold the information it provided SSB under FOIA exception 552(b)(5). The ruling also includes a reference to the 5th Circuit case involving the judicial process for accessing sealed orders.

Let me know if you have any questions, and I will check back in on this tomorrow.

Justin

House Managers

EX. 041



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 25, 2019

Ms. M.L. Calcote
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2020-

Dear Ms. Calcote:

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# 828822 (ORR# 20-0983).

The Texas Department of Public Safety (the "department") received a request for communications regarding specified topics and a specified address. The department claims the submitted information is excepted from disclosure under section 552.108 of the Government Code. The department also states, and provides documentation showing, it notified the Federal Bureau of Investigation (the "FBI") of the department's receipt of the request for information and of the FBI's right to submit arguments to this office as to why the requested information 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

¹ Although the department received the request on March 12, 2020, the department did not notify the FBI of the department's receipt of the request until May 5, 2020. Our office received comments from the FBI on May 15, 2020.

have considered the claimed exception and reviewed the submitted information. We have also received and considered comments submitted by FBI.

We note the remaining requested information is the subject of pending litigation in *Joseph Larsen v. Texas Department of Public Safety*, Cause No. D-1-GN-20-002155, in the 459th Judicial District, Travis County, Texas. Accordingly, we are closing our file assigned ID# 828822 without issuing a decision and will allow the trial court to determine whether the information at issue must be released to the public.

Sincerely,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/

Ref: ID# 828822

Enc. Submitted documents

c: Requestor
(w/o enclosures)

REF: ID # 828822

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have considered the claimed exception and reviewed the submitted information. We have also received and considered comments submitted by the FBI.

Section 552.108(a) 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: (1) 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 information at issue 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, 710 (Tex. 1977). The department generally asserts that the submitted information is excepted from disclosure under section 552.108(a)(1). The FBI also asserts the submitted information is excepted from disclosure under section 552.108(a)(1). However, we find both the department and the FBI have failed to demonstrate section 552.108(a)(1) is applicable to the information at issue. Thus, the department may not withhold the submitted information under section 552.108(a)(1) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”² Gov’t Code § 552.101. Section 552.101 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

² 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).*

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. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. See Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). The Third Court of Appeals has also 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.). Additionally, 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. *U.S. 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. Upon review, we find some of the remaining information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the

department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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.³ *See* Gov't Code § 552.130. Accordingly, the department must withhold the motor vehicle record information we have 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 department must withhold the account numbers we have marked under section 552.136 of the Government Code.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The department must withhold the account

³ 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).

numbers we have marked under section 552.136 of the Government Code. The department must release the remaining information.⁴

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 L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/

Ref: ID# 828822

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴ We note the remaining information includes social security numbers. Section 552.147(b) of the Government Code authorizes a government 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).

REF: ID # 828822

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