



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 7, 2016

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Paige Mebane
Assistant City Attorney
Office of the City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2016-05261

Dear Ms. Mebane

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# 600481 (City PIR No. W047075).

The City of Fort Worth (the "city") received a request for all e-mails to and from a named city employee during a specified time period. You state you will redact information protected by section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code, access device numbers pursuant to section 552.136(c) of the Government Code, and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You state the city has released some information to the requestor. You

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, you acknowledge, and we agree, the city failed to comply with the procedural requirements of section 552.301 of the Government Code. *See* Gov't Code § 552.301(b), (e). A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982).

You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. However, sections 552.107 and 552.111 of the Government Code are discretionary in nature. They serve to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Because the city has failed to comply with the procedural requirements of the Act, the city has waived all of these discretionary exceptions to disclosure. Although you reference *Abbott v. City of Dallas*, 453 S.W. 3d 580, 587-89 (Tex. App.—Austin 2014, pet. filed) and *City of Dallas v. Paxton*, No. 13-1300397-CV, 2015 WL 601974 (Tex. App.—Corpus Christi Feb. 12, 2015, pet. filed) (mem. op.), we note petitions for review were filed with the Texas Supreme Court on

²Although you do not raise section 552.111 of the Government Code in your brief, we understand you to assert this exception based on your markings. In addition, although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002). Furthermore, 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. *See id.* Finally, although you have marked some of the submitted information under section 552.101 of the Government Code and “pet registry,” you make no arguments to support this claim. Therefore, we assume you have withdrawn this argument. *See* Gov't Code §§ 552.301, .302.

³We 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 that those records contain substantially different types of information than that submitted to this office.

January 27, 2015, and March 26, 2015, respectively. Thus, we find these decisions are limited to the facts and information at issue in the underlying letter rulings, and do not apply to the information currently at issue. However, you also claim section 552.101 of the Government Code for some of the submitted information. In addition, we note portions of the submitted information are subject to section 552.102 of the Government Code.⁴ Because these exceptions can provide compelling reasons to overcome the presumption of openness, we will address their applicability to the submitted information.

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 the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant part, the following:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 at 3-4 (1988), 370 at 2 (1983), 343 at 1 (1982). Upon review, we find the information we have marked is confidential under the MPA. Accordingly, the city must

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.⁵

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the city must withhold the information we have marked under section 552.102(a) of the Government Code.⁶

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 highly intimate or 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). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). We note, however, the public generally has a legitimate interest in information relating to public employment and public employees. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 (public employee’s job performance does not generally constitute employee’s private affairs), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). We further note some of the information at issue pertains to worker’s compensation claims, and thus, there is a legitimate public interest in this information. *See* ORDs 545 at 4 (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be

⁵As our ruling is dispositive, we do not address your argument to withhold this information.

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

those regarding receipt of governmental funds or debts owed to governmental entities), 423 at 2. In addition, information pertaining to leave of public employees is generally a matter of legitimate public interest. *See* Open Records Decision No. 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private).

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. *Indus. Found.*, 540 S.W.2d at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller*, 354 S.W.3d 336. *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 supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.⁷ *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3.

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. Further, the city must withhold all public citizens' dates of birth in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated the remaining information you have marked is highly intimate or embarrassing and not of legitimate public concern. Thus, the remaining information may not be withheld under section 552.101 in conjunction with common-law privacy.

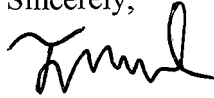
In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. The city must withhold the information we have marked under section 552.102(a) of the Government Code. The city must withhold the information we have marked, as well as all public citizens' dates of birth in the remaining information, under section 552.101 of the Government Code in conjunction with common-law privacy. The city 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.

⁷As noted above, section 552.102(a) exempts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

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 http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tim Neal', written in a cursive style.

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 600481

Enc. Submitted documents

c: Requestor
(w/o enclosures)

MAR 28 2018 SH

At 9:45 A.M.
Velva L. Price, District Clerk

Cause No. D-1-GN-16-001211

THE CITY OF FORT WORTH, TEXAS, <i>Plaintiff,</i>	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	98th JUDICIAL DISTRICT
	§	
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, <i>Defendant.</i>	§	
	§	
	§	TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This cause is an action under the Public Information Act (PIA), Texas Government Code chapter 552, in which Plaintiff the City of Fort Worth, Texas (City), sought to withhold certain requested information from public disclosure. All matters in controversy between the City and Defendant Ken Paxton, Attorney General of Texas (Attorney General), arising out of this lawsuit are resolved by a Settlement Agreement, a copy of which is attached as Exhibit "A," and the parties agree to the entry and filing of this Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. See Tex. Gov't Code § 552.325. The Attorney General represents to the Court that in compliance with Texas Government Code section 552.325(c), the Attorney General sent a letter by certified mail and electronic mail to the requestor, Suzette Watkins, on Feb. 26, 2018, providing reasonable notice of this setting. The requestor was informed of the parties' agreement that the City must withhold the information at issue. The requestor was also informed of her

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right to intervene in the suit to contest this Agreed Final Judgment. The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of this Agreed Final Judgment is appropriate.

IT IS THEREFORE ORDERED AND DECLARED that:

1. Pursuant to Texas Government Code section 552.107 and *Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017), the City must withhold the attorney-client communications from the requestor in accordance with the markings on the representative sample pages CFW-0001 through CFW-0048 and CFW-0050 through CFW-0063, which were produced to the Attorney General under the March 1, 2017 Agreed Protective Order.

2. All court cost and attorney fees are taxed against the parties incurring the same;

3. All relief not expressly granted is denied; and

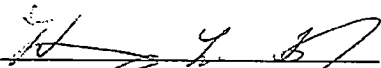
4. This Order disposes of all claims between the parties and is a final judgment.

Signed this the 28th day of March, 2018.

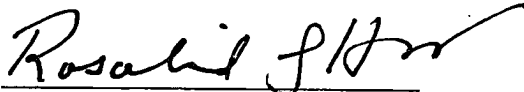


PRESIDING JUDGE

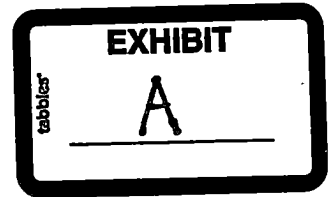
AGREED:


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ATTORNEY FOR PLAINTIFF
CITY OF FORT WORTH


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ATTORNEY FOR DEFENDANT
ATTORNEY GENERAL OF TEXAS



Cause No. D-1-GN-16-001211

THE CITY OF FORT WORTH, TEXAS, <i>Plaintiff,</i>	§ § § § § § § § §	IN THE DISTRICT COURT OF
v.		98th JUDICIAL DISTRICT
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, <i>Defendant.</i>		TRAVIS COUNTY, TEXAS

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Plaintiff the City of Fort Worth, Texas (City) and Defendant Ken Paxton, Attorney General of Texas (Attorney General).

I. BACKGROUND

This is a lawsuit under the Public Information Act (PIA), Texas Government Code chapter 552, by which the City sought declaratory relief from an open records ruling of the Attorney General. The ruling required the City to release information it claimed was subject to the attorney-client privilege as the City did not comply with procedural requirements of section 552.301. *See* Tex. Att’y Gen. OR2016-05261; Tex. Gov’t Code § 552.301. Consequently, the requested information was presumed open to public disclosure unless a compelling reason exists to withhold the information. *See* Tex. Gov’t Code § 552.302. The ruling concluded the City failed to demonstrate a compelling reason to withhold the privileged information from disclosure and must release the information to the requestor.

During the pendency of the lawsuit, the Texas Supreme Court issued the

decision, *Paxton v. City of Dallas*, which held “a ‘compelling reason’ to withhold confidential attorney-client communications exists and, absent waiver, rebuts the presumption that the information protected by the privilege is ‘subject to required public disclosure.’” *Paxton v. City of Dallas*, 509 S.W.3d 247, 267–68 (Tex. 2017). Consistent with the *Paxton* decision, the parties agree that portions of the requested information are attorney-client privileged communications and may be withheld from the requestor pursuant to *Paxton v. City of Dallas* and Texas Government Code section 552.107.

Pursuant to section 552.325(c) of the Texas Government Code, the Attorney General may enter into a settlement that allows all or part of the information at issue in this lawsuit to be withheld. The parties agree to the following terms.

II. TERMS

For good and sufficient consideration, the receipt of which is acknowledged, the parties agree and stipulate that:

1. Pursuant to Texas Government Code section 552.107 and *Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017), the City must withhold the attorney-client communications from the requestor in accordance with the markings on the representative sample pages CFW-0001 through CFW-0048 and CFW-0050 through CFW-0063, which were produced to the Attorney General under the March 1, 2017 Agreed Protective Order.

2. The Attorney General agrees to notify the requestor, as required by Texas Government Code section 552.325(c), of the proposed settlement and of her

right to intervene to contest the City's right to withhold the information. If the requestor intervenes to contest the City's right to withhold the information at issue, the terms of a final judgment entered in this lawsuit after a requestor intervenes shall prevail over the terms of this Agreement.

3. The City and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney.

4. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.

5. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.

6. The City warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the City has against the Attorney General arising out of the matters described in this Agreement.

7. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has

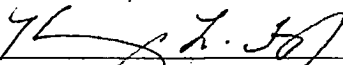
against the City arising out of the matters described in this Agreement.

8. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

AGREED:

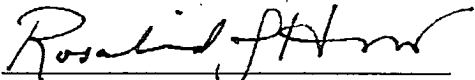
Date: 2 / 15 / 18

Date: 02 / 23 / 2018




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ATTORNEY FOR DEFENDANT
ATTORNEY GENERAL OF TEXAS



Susan Alanis
Assistant City Manager