



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 27, 2016

Ms. Lindsey Wolf
General Counsel
Office of the Secretary of State
P.O. Box 12697
Austin, Texas 78711-2697

OR2016-16898

Dear Ms. Wolf:

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# 620061.

The Office of the Secretary of State (the "secretary's office") received a request for five categories of information pertaining to voter registration, including complaints, reports, and other communications.¹ You state you do not have information responsive to portions of the request.² You state you have released some information to the requestor and will release additional information pending the requestor's response to a cost estimate. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.108, 552.110, 552.111, 552.130, 552.136, 552.137, 552.139, and 552.147 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil

¹We note the secretary's office sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

Procedure.³ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

Initially, we note some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-27003 (2015). In that ruling, we determined: (1) to the extent the requested information was identical to the information previously requested and ruled upon by this office, the secretary's office may continue to rely on Open Records Letter No. 2015-16527 (2015) as a previous determination and withhold the identical information in accordance with that ruling; (2) the secretary's office may withhold the information you marked under section 552.103 of the Government Code; (3) the secretary's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code; (4) the secretary's office 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; (5) to the extent the information you marked pertains to individuals subject to section 552.1175(a), and the individuals elect to restrict access to this information in accordance with section 552.1175(b), the secretary's office must withhold the information you marked under section 552.1175 of the Government Code; (6) the secretary's office must withhold the motor vehicle record information you marked under section 552.130 of the Government Code; (7) the secretary's office must withhold the personal e-mail address you marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure; and (8) the secretary's office must release the remaining information. You note, however, the anticipated litigation the secretary's office relied on to withhold the information at issue in Open Records Letter No. 2015-27003 under section 552.103 is no longer anticipated; rather, the litigation is now pending. Therefore, the facts and circumstances have changed with respect to any information previously withheld under section 552.103 of the Government Code. Accordingly, the secretary's office may not rely on Open Records Letter No. 2015-27003 with respect to that information. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we have no indication the law, facts, or circumstances on which the previous ruling was based have changed with respect to the remaining information at issue. Thus, the secretary's office must continue to rely on

³Although you raise section 552.101 of the Government Code in conjunction with section 552.111 and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges or other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

⁴We 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.

Open Records Letter No. 2015-27003 as a previous determination and withhold or release the remaining information at issue in accordance with that ruling. *See id.* Additionally, we will consider your arguments for the submitted information not subject to the previous ruling.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 31.006 of the Election Code. Section 31.006 of the Election Code provides the following:

(a) If, after receiving a complaint alleging criminal conduct in connection with an election, the [secretary’s office] determines that there is reasonable cause to suspect that the alleged criminal conduct occurred, the secretary shall promptly refer the complaint to the [Office of the Attorney General (“OAG”)]. The secretary shall deliver to the [OAG] all pertinent documents in the secretary’s possession.

(b) The documents submitted under Subsection (a) are not considered public information until:

(1) the [secretary’s office] makes a determination that the complaint received does not warrant an investigation; or

(2) if referred to the [OAG], the [OAG] has completed the investigation or has made a determination that the complaint referred does not warrant an investigation.

Elec. Code § 31.006. We understand the information in Exhibit G was delivered to the OAG pursuant to section 31.006(a). You inform us this information is either still under investigation with the OAG or is still being reviewed by the secretary’s office. Based on your representations and our review, we agree the information at issue is not considered public information under section 31.006(b). Accordingly, the secretary’s office must withhold the information in Exhibit G under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code.⁵

Section 552.101 of the Government Code also encompasses common-law privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas 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 established. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in

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

Industrial Foundation. *Id.* at 683. This office has also 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) (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 conclude the information we have marked in Exhibit F meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the secretary's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated any of the remaining information 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.

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state, and provide documentation showing, prior to the secretary's office's receipt of the instant request, a lawsuit styled *Stringer v. Carlos H. Cascos, in His Official Capacity as the Texas Secretary of State et. al.* was filed and is currently pending against the secretary's office in the United States District Court, Western District of Texas, San Antonio Division. Therefore, we agree litigation was pending on the date the secretary's office received the present request for information. You also state the information in Exhibits C and E pertains to the substance of the lawsuit claims. Based on your representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude the secretary's office may withhold the information in Exhibits C and E under section 552.103 of the Government Code.⁶

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The remaining e-mail address at issue in Exhibit F is not of a type excluded by subsection (c). Therefore, the secretary's office must withhold the personal e-mail address you have marked in the remaining information under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

Finally, you ask whether you must disclose certain information subject to chapter 18 of the Election Code. Pursuant to subchapter A of chapter 18 of the Election Code, the registrar in each county must prepare for each precinct a certified list of registered voters in the precinct. *See* Elec. Code §§ 18.001-.004 (discussing original, supplemental, registration correction, and revised original lists of registered voters), 12.001 (stating county tax assessor-collector is voter registrar for county). Each original and supplemental list of registered voters must contain the voter's name, date of birth, and registration number, the voter's residence address, except as provided by subsections (b) and (c) or section 18.0051, and the notation required by section 15.111 of the Election Code. *See id.* § 18.005(a)(1)-(2), (4); *see also id.* §§ 18.0051 (discussing substitute addresses in list of registered voters), 15.111(a) (explaining registrar shall enter certain notation on registered voter's list beside voter's name on suspense list). Section 18.008 of the Election Code provides, in part, as follows:

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

(a) The registrar shall furnish a copy of any list prepared under . . . subchapter [A of chapter 18] to any person requesting it. The copy shall be furnished without the names of voters whose names appear on a list with the notation “S”, or a similar notation, if requested in that form.

Id. § 18.008(a). We note section 18.008 is applicable to the registrars in each county. In this instance, the secretary’s office received the request for information, not the county registrar. Therefore, we find section 18.008 of the Election Code is not applicable to the instant request for information, and no portion of the information at issue must be disclosed to the requestor on that basis.⁷

Pursuant to subchapter C of chapter 18 of the Election Code, “[t]he secretary of state shall implement and maintain a statewide computerized voter registration list that serves as the single system for storing and managing the official list of registered voters in the state[.]” which, “must contain the name and registration information of each voter registered in the state[.]” *See id.* § 18.061(a)-(b)(1). Section 18.066 of the Election Code provides, in part, as follows:

(a) The secretary of state shall furnish information in the statewide computerized voter registration list to any person on request not later than the 15th day after the date the request is received.

Id. § 18.066(a). In this instance, the secretary’s office did not receive a request for information in the statewide computerized voter registration list. Rather, the secretary’s office received a request for, in relevant part, complaints, reports, and communications pertaining to voter registration. Although you state information from the statewide computerized list exists within the requested information, as the instant request was not specifically for information within the statewide computerized voter registration list, we find the secretary’s office need not disclose any information at issue to the requestor pursuant to section 18.066(a) of the Election Code.⁸

In summary, except for the information withheld under section 552.103 of the Government Code, the secretary’s office must continue to rely on Open Records Letter No. 2015-27003 as a previous determination and withhold or release the remaining information at issue in accordance with that ruling. The secretary’s office may withhold the information in Exhibits C and E under section 552.103 of the Government Code. The secretary’s office must withhold the information in Exhibit G under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code. The secretary’s office must withhold the information we have marked under section 552.101 of the Government Code

⁷As our ruling is dispositive, we need not address the remaining argument against disclosure.

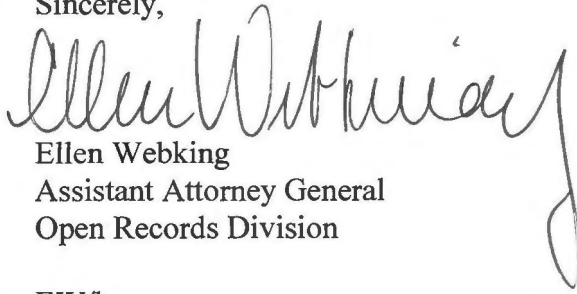
⁸As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

in conjunction with common-law privacy. The secretary's office must withhold the personal e-mail address you have marked in the remaining information under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The secretary's office 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 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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/bw

Ref: ID# 620061

Enc. Submitted documents

c: Requestor
(w/o enclosures)