



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.



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ATTORNEY GENERAL OF TEXAS

November 18, 2016

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

Mr. Jeff Rambin
Counsel for the East Texas Council of Government
Capshaw DeRieux LLP
114 East Commerce Avenue
Gladewater, Texas 75647

OR2016-25755

Dear Mr. Rambin:

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# 634832.

The East Texas Council of Government (the "council"), which you represent, received a request for information, including communications, pertaining to a specified investigation.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, 552.136, and 552.137 of the Government Code.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-25734

¹You state the council sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you also raise section 552.101 of the Government Code in conjunction with sections 552.107 and 552.111 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

(2016). In that ruling, we determined the council: (1) must withhold the information we marked and, with the exception of the requestor's date of birth and the dates of birth of the de-identified individuals, all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the council must withhold the information we indicated under section 552.101 of the Government Code in conjunction with constitutional privacy; (3) the council must withhold the motor vehicle record information not belonging to the requestor under section 552.130 of the Government Code; (4) with the exception of the requestor's e-mail address, the council must withhold the e-mail addresses under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies; and (5) must release the remaining responsive information; however, any information protected by copyright may only be released in accordance with copyright law. However, while the requestor in Open Records Letter No. 2016-25734 had a right of access to certain information pursuant to sections 552.023 and 552.137(b) of the Government Code, the instant request involves a different requestor who does not have the same rights of access to the information at issue. Thus, the circumstances have changed with respect to this information, and the council may not rely on Open Records Letter No. 2016-25734 as a previous determination with respect to that information. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based with respect to the remaining information at issue. Accordingly, with the exception of the information to which the previous requestor had a right of access, we conclude the council must generally rely on Open Records Letter No. 2016-25734 as a previous determination and withhold or release the information at issue in accordance with that ruling. *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 note you now seek to withhold the submitted information under sections 552.103, 552.107, and 552.111 of the Government Code, some of which may have been previously released pursuant to Open Records Letter No. 2016-25734. Section 552.007 of the Government Code, however, provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the council may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise sections 552.103, 552.107, and 552.111 of the Government Code, these sections do not prohibit the release of information or make information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103);

Open Records Decision Nos. 677 at 8-10 (2002) (governmental body may waive attorney work product privilege under section 552.111 and Texas Rule of Civil Procedure 192.5), 676 at 10-11 (attorney-client privilege under section 552.107(1) and Texas Rule of Evidence 503 may be waived), 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). Thus, to the extent any of the requested information was previously released in accordance with Open Records Letter No. 2016-25734, the council may not now withhold such information under section 552.103, section 552.107, or section 552.111. However, because sections 552.101, 552.117, 552.130, 552.136, and 552.137 of the Government Code make information confidential under the Act, we will consider their applicability to the information at issue.³ Further, we will consider your arguments for the submitted information to the extent it is not subject to Open Records Letter No. 2016-25734 or it was not released in accordance with the prior ruling.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information at issue consists of information pertaining to a completed investigation which is subject to section 552.022(a)(1) and must be released unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022 under sections 552.103, 552.107, and 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; *see also* ORDs 676 at 10-11, 677 at 8, 665 at 2 n.5, 663 at 5. Therefore, the information at issue may not be withheld under these exceptions. The Texas Supreme Court has held, however, the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your assertion of the attorney-client privilege under Texas Rule of Evidence 503 and your assertion of the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the information subject to section 552.022. Additionally, as sections 552.101, 552.117, 552.130, 552.136, and 552.137

³The 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).

of the Government Code make information confidential under the Act, we will address the applicability of these sections to the information at issue.

We note the council seeks to withhold a portion of the submitted information based on the assertion that the information at issue promises individuals that information obtained from them will be kept confidential. However, we note information is not confidential under the Act simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, the council must release it, notwithstanding any expectations or agreement specifying otherwise.*

We understand the council to claim the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 823.24(b)(3) of title 40 of the Texas Administrative Code. 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 information made confidential by other statutes. Section 302.002(d) of the Labor Code authorizes the Texas Workforce Commission (the “commission”) to adopt rules to administer the commission’s workforce development division. Lab. Code § 302.002(d) (commission shall adopt rules in accordance with Chapter 2001, Government Code, as necessary for proper administration of the commission’s workforce development division). We understand under the authority of section 302.002(d), the commission promulgated section 823.24(b)(3) of title 40 of the Texas Administrative Code. Section 823.24 details procedures for certain hearings before the commission. Section 823.24(b)(3) provides “[c]onfidentiality of information contained in the hearing record shall be maintained in accordance with federal and state law.” 40 T.A.C. § 823.24(b)(3). For information to be confidential under section 552.101, a statute must explicitly require confidentiality. *See Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public), 465 at 4-5 (1987); see also Indus. Found.*, 540 S.W.2d at 677 (governmental agency may not bring information within scope of statutory predecessor to section 552.101 by promulgation of rule; to imply such authority merely from general rule-making powers would be to allow agency to circumvent very purpose of the Act). Confidentiality cannot be implied from the structure of a statute or rule. *See ORD 465 at 4-5.* We note section 823.24(b)(3) provides the commission must maintain confidential information contained in such a hearing record in accordance with applicable federal and state law and does not, itself, make information confidential for purposes of the Act. Accordingly, the council may not

withhold the information at issue under section 552.101 in conjunction with section 823.24(b)(3) of title 40 of the Texas Administrative Code.

Next, we will address your arguments under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure for the information subject to section 552.022 of the Government Code to the extent this information has not previously been released. Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding)

(privilege attaches to complete communication, including factual information). We note communications with third parties with whom a governmental entity shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You assert the submitted information was communicated between council attorneys and staff for the purpose of facilitating the rendition of professional legal services to the council. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the council has demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, to the extent this information was not previously released, the council may withhold the information we have marked under rule 503.⁴ However, we find you have failed to demonstrate the remaining information consists of privileged attorney-client communications made for the rendition of professional legal services. Thus, the council may not withhold any of the remaining information under Texas Rule of Evidence 503.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue and (2) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is

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

privileged under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 425 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You assert the remaining information consists of privileged attorney work product. Upon review, we find you have not demonstrated any of the information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. We therefore conclude the council may not withhold any of the remaining information under Texas Rule of Civil Procedure 192.5.

As previously mentioned, section 552.101 of the Government Code encompasses information other statutes make confidential. We understand you to claim the information at issue is protected by the Privacy Act of 1974, section 552a of title 5 of the United States Code ("Federal Privacy Act"). Section 552a(b) of the Federal Privacy Act provides, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains[.]" 5 U.S.C. § 552a(b). However, our office and the courts have stated the Federal Privacy Act applies only to federal agencies, and not to state or local agencies. *See St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of agency under Privacy Act does not encompass state agencies or bodies); *Shields v. Shetler*, 682 F. Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies); Attorney General Opinion MW-95 at 2 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). The courts have also opined that neither the receipt of federal funds nor limited oversight by a federal entity convert state or local governmental bodies into agencies covered by the Privacy Act. *See St. Michael's Convalescent Hosp.*, 643 F.2d at 1373-74; *see also United States v. Orleans*, 425 U.S. 807, 816 (1976) (federal regulations and contract provisions do not convert acts of local and state governmental bodies into federal governmental acts.). Upon review, we find you have failed to demonstrate the Federal Privacy Act applies to the information at issue, and you may not withhold any of it under section 552.101 on that basis.

Next, you to contend the submitted information is confidential under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code and the federal Child Abuse Prevention and Treatment Act ("CAPTA"). CAPTA conditions federal grant funding for state child abuse prevention and treatment programs on the fulfillment of certain eligibility criteria and requires states to adopt methods to preserve the confidentiality of information concerning child abuse and neglect. *See* 42 U.S.C. § 5106a(b)(1)(A), (2)(B)(viii). Chapter 261 of the Family Code was enacted in accordance with CAPTA. Information pertaining to reports or investigations of alleged or suspected child abuse or neglect is generally confidential under section 261.201 of the Family Code. *See* Fam. Code § 261.201(a). However, you have submitted no arguments explaining the applicability of CAPTA or section 261.201 of the Family Code to the submitted information. *See* Gov't Code §§ 552.301(e)(1)(A), .302. Accordingly, we find the council has failed to demonstrate

CAPTA or section 261.201 of the Family Code applies to the information at issue. Thus, the council may not withhold any of the information at issue under section 552.101 of the Government Code pursuant to CAPTA or section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. The submitted information contains personal tax return information. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of . . . income, payments, . . . tax withheld, deficiencies, over assessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A). Upon review, we find the council must withhold the tax return information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.⁵

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.*, 540 S.W.2d at 685. 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 concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Additionally, this office has also 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. 600 (1992) (personal financial information includes choice of particular insurance carrier), 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). 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 of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet.

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

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.⁶ *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*. We note some of the dates of birth in the information at issue pertain to individuals who have been de-identified and whose privacy interests are, thus, protected. Accordingly, the council must withhold the information we have marked and all identifiable public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.⁷ However, we find the remaining information is not highly intimate or embarrassing and is of no legitimate public interest. Accordingly, the council may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.101 of the Government Code also encompasses the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned, "vague assertions of risk will not carry the day." *Id.* at 119. Upon review, we find you have failed to demonstrate release of the remaining information would create a substantial threat of physical harm for council employees. Accordingly, the council may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and

⁶Section 552.102(a) 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).

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find the council must withhold the information we indicated under section 552.101 in conjunction with constitutional privacy. However, we find no portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the council may not withhold any of the remaining information under section 552.101 on the basis of constitutional privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Upon review, however, we find none of the remaining consists of the home address, home telephone number, emergency contact information, social security number, or family member information of a current or former employee of the council, and none of the remaining information may be withheld under section 552.117(a)(1) of the Government Code.

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. *See* Gov't Code § 552.130(a). The council must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

You contend the Workforce Information System of Texas ("TWIST") identification numbers are subject to section 552.136 of the Government Code. Section 552.136 states "[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"). Upon review, we find you have not explained how the TWIST identification numbers consist of a credit card, debit card, or charge card number, or are access device numbers used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, we find you have failed to demonstrate the

applicability of section 552.136 to the information at issue. Accordingly, the council may not withhold any of the remaining information under section 552.136 of the Government Code.

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). *Id.* § 552.137(a)-(c). Accordingly, the council must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release or they are subject to subsection(c).

In summary, with the exception of the information to which the previous requestor had a right of access, the council must continue to rely on Open Records Letter No. 2016-52734 and withhold or release the submitted information to the extent it is identical to the information at issue in that ruling. To the extent the information at issue has not previously been released, the council may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The council must withhold the tax return information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The council must withhold the information we have marked, and all identifiable public citizens’ dates of birth, under section 552.101 of the Government Code in conjunction with common-law privacy. The council must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with constitutional privacy. The council must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The council must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release or they are subject to subsection(c). The council must release the remaining information.⁸

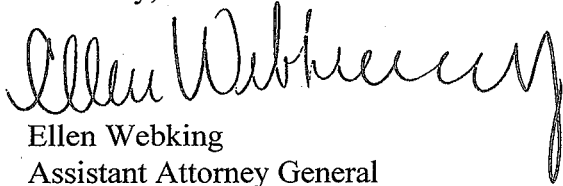
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

⁸We note the information being released contains social security numbers. 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. *See* Gov’t Code § 552.147(b).

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 "Ellen Webking". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Ellen Webking
Assistant Attorney General
Open Records Division

EW/bhf

Ref: ID# 634832

Enc. Submitted documents

c: Requestor
(w/o enclosures)

MAR 28 2018 SH

At 8:47 A.M.
Velva L. Price, District Clerk

Cause No. D-1-GN-16-005814

EAST TEXAS COUNCIL OF
GOVERNMENTS,
Plaintiff,

v.

KEN PAXTON, ATTORNEY
GENERAL OF TEXAS,
Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

201st JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

This is a cause of action under the Public Information Act (PIA), Texas Government Code chapter 552, in which Plaintiff East Texas Council of Governments (ETCOG) sought to withhold certain information from public disclosure. All matters in controversy between Plaintiff ETCOG and Defendant Ken Paxton, Attorney General of Texas (Attorney General), arising out of this lawsuit have been resolved by a Settlement Agreement, a copy of which is attached hereto 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. The Attorney General represents to the Court that in compliance with section 552.325(c), the Attorney General sent a letter by certified mail and/or electronic mail to the last known addresses of the requestors, Melanie Law and Glenn Evans, providing reasonable notice of this setting. The requestors were informed of the parties' agreement that ETCOG must withhold certain information

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from disclosure and of the requestors' right to intervene in the suit to contest ETCOG's right to withhold the information. The requestors have not filed motions to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate.

IT IS THEREFORE ADJUDGED, 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), ETCOG must withhold from both requestors the attorney-client privileged communications in accordance with the Attorney General's markings in the representative sample exhibits C, D, and E produced to the Attorney General under the May 18, 2017 Agreed Protective Order.

2. ETCOG must release or withhold all other information responsive to the requests in compliance with Letter Rulings OR2016-25734 and OR2016-25755, and if appropriate, ETCOG may charge for providing copies of the information at issue to the requestors in accordance with Texas Government Code section 552.261 and the regulations promulgated by the Attorney General. Furthermore, Letter Rulings OR2016-25734 and OR2016-25755 will not be considered "previous determinations" by the Open Records Division of the Office of the Attorney General under Tex. Gov't Code § 552.301(a), (f); and, if the precise information is requested again, ETCOG may ask for a decision from the Attorney General under Tex. Gov't Code § 552.301(g).

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

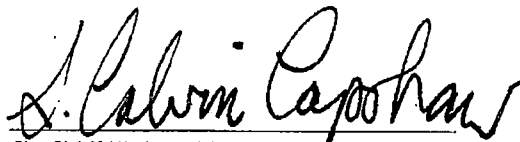
4. All relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims and all parties and is a final judgment.

Signed this 28th day of March, 2018.

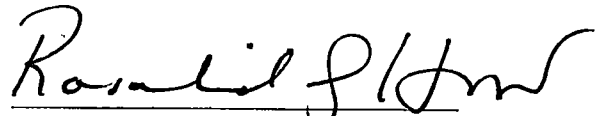

JUDGE PRESIDING

AGREED:



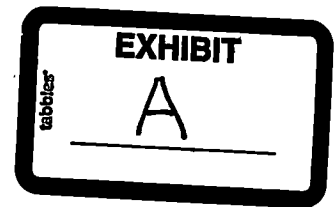
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ATTORNEY FOR DEFENDANT
ATTORNEY GENERAL OF TEXAS



Cause No. D-1-GN-16-005814

EAST TEXAS COUNCIL OF GOVERNMENTS,
Plaintiff,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

201st JUDICIAL DISTRICT

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Plaintiff East Texas Council of Governments (ETCOG) and Defendant Ken Paxton, Attorney General of Texas (Attorney General), on the terms set forth below.

I. BACKGROUND

On July 20, 2016, ETCOG received a request for public information from a child care contractor, Ms. Melanie Law d/b/a Punkin' Doodles, for a broad range of documents concerning the termination of Punkin' Doodles' child care contract. On July 21, 2016, Glenn Evans of the Longview News Journal also requested public information concerning the operation and records of Melanie Law d/b/a Punkin' Doodles, including correspondence between ETCOG personnel and attorneys for ETCOG.

ETCOG sought clarification and narrowing of the requests from both requestors, which delayed ETCOG's request for open records rulings from the Attorney General. On September 12, 2016, ETCOG sought Attorney General decisions on both requests under the Public Information Act (PIA), Texas

Government Code section 552.301, on whether portions of information could be withheld.

The Attorney General issued two Letter Rulings in response. The first Letter Ruling, OR2016-25734, addressed Ms. Law's request for information and concluded ETCOG did not timely request an Attorney General decision in accordance with PIA section 552.301's mandatory deadlines. *See* Tex. Att'y Gen. OR2016-25734 at 2-3. As a consequence, the requested information is presumed subject to public disclosure unless a compelling reason exists to withhold the requested information. *See* Tex. Gov't Code § 552.302. ETCOG was required to withhold from disclosure certain confidential information under PIA sections 552.130, 552.137, and 552.101 in conjunction with common law privacy and constitutional privacy, but must release privileged information subject to PIA sections 552.103 and 552.107. *See* Tex. Att'y Gen. OR2016-25734 at 3, 7.

With regards to Mr. Evans's request for the same information, the Attorney General issued the second Letter Ruling, OR2016-25755, which ruled ETCOG complied with PIA section 552.301, and may withhold the attorney-client privilege communications to the extent it was not previously released.

ETCOG disputed the rulings and filed this suit to challenge both rulings. 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 agreed that the attorney-client privileged communications must be withheld from the requestors pursuant to Texas Government Code section 552.107 and *Paxton v. City of Dallas*.

All matters in controversy between the parties arising out of this lawsuit have been resolved. Pursuant to Texas Government Code section 552.325(c), the Attorney General may enter into a settlement that allows all or part of the information at issue in this lawsuit to be withheld. Tex. Gov't Code § 552.325(c). The parties agree to the following terms.

II. TERMS

For good and sufficient consideration, including the compromise and settlement of a good faith dispute concerning the application of the Public Information Act to the requests at issue, 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), ETCOG must withhold from both requestors the attorney-client privileged communications in accordance with the Attorney General's markings in the representative sample exhibits C, D, and E produced to the Attorney General under the May 18, 2017 Agreed Protective Order.

2. ETCOG must release or withhold all other information responsive to the requests in compliance with Letter Rulings OR2016-25734 and OR2016-25755; and if appropriate, ETCOG may charge for providing copies of the information at

issue to the requestors in accordance with Texas Government Code section 552.261 and the regulations promulgated by the Attorney General. Furthermore, Letter Rulings OR2016-25734 and OR2016-25755 will not be considered "previous determinations" by the Open Records Division of the Office of the Attorney General under Tex. Gov't Code § 552.301(a), (f); and, if the precise information is requested again, ETCOG may ask for a decision from the Attorney General under Tex. Gov't Code § 552.301(g).

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

4. The parties, ETCOG 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.

5. Before entry of the agreed final judgment, the Attorney General will notify the requestor, as required by Texas Government Code section 552.325(c), of the proposed settlement and of his right to intervene. If the requestor intervenes, then this Agreement shall become null and void and the agreed final judgment shall not be entered.

6. 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.

7. ETCOG 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 ETCOG has against the Attorney General arising out of the matters described in this Agreement.

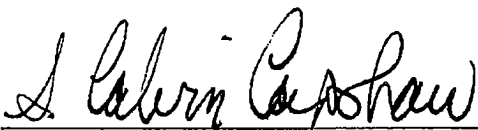
8. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General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

9. 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:

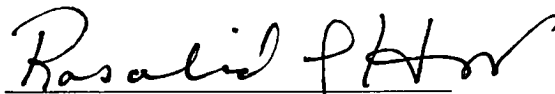
Date: 2/26/2018

Date: 02/26/2018



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