



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 13, 2017

Ms. Marney Collins Sims
General Counsel
Cypress-Fairbanks Independent School District
P. O. Box 692003
Houston, Texas 77269-2003

OR2017-03250

Dear Ms. Sims:

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# 645678.

The Cypress-Fairbanks Independent School District (the "district") received a request for ten categories of information related to a specified incident.¹ You state you have released some information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note a portion of the submitted documents does not pertain to the specified incident. Thus, this information is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release this information in response to this request.

¹We note the district 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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Section 552.101 of the Government Code exempts 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 subject to chapter 550 of the Transportation Code. Section 550.065 applies only to a written report of an accident required under section 550.061, 550.062, or 601.004. Transp. Code § 550.065(a)(1). Chapter 550 requires the creation of a written report when the accident resulted in injury to or the death of a person or damage to the property of any person to the apparent extent of \$1,000 or more. *Id.* §§ 550.061 (operator’s accident report), .062 (officer’s accident report). An accident report is privileged and for the confidential use of the Texas Department of Transportation or a local governmental agency of Texas that has use for the information for accident prevention purposes. *Id.* § 550.065(b). However, a governmental entity may release an accident report in accordance with subsections (c) and (c-1). *Id.* § 550.065(c), (c-1). Section 550.065(c) provides a governmental entity shall release an accident report to a person or entity listed under this subsection. *Id.* § 550.065(c).

The submitted information includes a CR-3 accident report form. In this instance, the requestor is not a person listed under section 550.065(c). Thus, the submitted CR-3 accident report is confidential under section 550.065(b), and the district must withhold it under section 552.101 of the Government Code. However, section 550.065(c-1) requires the district to create a redacted CR-3 report that may be requested by any person. *Id.* § 550.065(c-1). The redacted accident report may not include the information listed in subsection (f)(2). *Id.* Accordingly, the district must release the redacted CR-3 report to the requestor pursuant to section 550.065(c-1). Further, we find you have not demonstrated the remaining information at issue is subject to section 550.065. Accordingly, the district may not withhold any portion of the remaining information under section 552.101 in conjunction with section 550.065(b).

Section 552.101 of the Government Code also encompasses section 31306 of title 49 of the United States Code and section 382.405 of title 49 of the Code of Federal Regulations. Section 31306 relates to alcohol and controlled substances testing for operators of commercial motor vehicles and provides, in relevant part:

(b) Testing program for operators of commercial motor vehicles. — (1)(A) In the interest of commercial motor vehicle safety, the Secretary of Transportation shall prescribe regulations that establish a program requiring motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of operators of commercial motor vehicles for the use of a controlled substance in violation of law or a United States Government regulation and to conduct reasonable suspicion, random, and post-accident testing of such operators for the use of alcohol in violation of law or a United States Government regulation.

49 U.S.C. § 31306(b)(1)(A). Section 31306(c) pertains to testing and laboratory requirements and provides, in part:

(c) Testing and laboratory requirements. — In carrying out subsection (b) of this section, the Secretary of Transportation shall develop requirements that shall —

...

(7) provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section[.]

Id. § 31306(c)(7). Federal regulations clarify the extent to which test results pertaining to operators of motor vehicles are confidential. Section 382.401 of title 49 of the Code of Federal Regulations, titled “Retention of records,” requires employers to retain certain records pertaining to alcohol and controlled substances testing. *See* 49 C.F.R. § 382.401. Section 382.401 provides, in part:

(a) General requirement. Each employer shall maintain records of its alcohol misuse and controlled substances use prevention programs as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) Period of retention. Each employer shall maintain the records in accordance with the following schedule:

(1) Five years. The following records shall be maintained for a minimum of five years:

(I) Records of driver alcohol test results indicating an alcohol concentration of 0.02 or greater,

(ii) Records of driver verified positive controlled substances test results,

(iii) Documentation of refusals to take required alcohol and/or controlled substances tests,

(iv) Driver evaluation and referrals,

(v) Calibration documentation,

(vi) Records related to the administration of the alcohol and controlled substances testing programs, and

(vii) A copy of each annual calendar year summary required by § 382.403.

(2) Two years. Records related to the alcohol and controlled substances collection process (except calibration of evidential breath testing devices) shall be retained for a minimum of 2 years.

(3) One year. Records of negative and canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.

...

(c) Types of records. The following specific types of records shall be maintained. "Documents generated" are documents that may have to be prepared under a requirement of this part. If the record is required to be prepared, it must be maintained.

(1) Records related to the collection process:

...

(ii) Documents relating to the random selection process;

...

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests; [and]

(vi) Documents generated in connection with decisions on post-accident tests[.]

(2) Records related to a drivers test results:

(i) The employers copy of the alcohol test form, including the results of the test; [and]

(ii) The employers copy of the controlled substances test chain of custody and control form[.]

Id. § 382.401(a), (b)(1)-(3), (c)(1)(ii), (v)-(vi), (c)(2)(i)-(ii). Section 382.405 of title 49 of the Code of Federal Regulations, titled “Access to facilities and records,” provides in part:

(a) Except as required by law or expressly authorized or required in this section, no employer shall release driver information that is contained in records required to be maintained under § 382.401.

...

(h) An employer shall release information regarding a driver’s records as directed by the specific written consent of the driver authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee’s specific written consent as outlined in § 40.321(b) of this title.

Id. § 382.405(a), (h). Section 382.405 also specifies other circumstances under which an employer may release test results. *See id.* § 382.405(b)-(g).

You indicate the information in Tab B is maintained by the district under section 382.401 of title 49 of the Code of Federal Regulations and is subject to section 382.405. You further state the driver at issue has not provided written consent for disclosure of the information at issue. You represent the requestor does not fall under one of the exceptions requiring release. *See id.* Thus, based on our review of the information and your representations, we find Tab B is confidential under section 31306 of title 49 of the United States Code and under section 382.405 of title 49 of the Code of Federal Regulations. Accordingly, we conclude that the district must withhold Tab B pursuant to section 552.101 of the Government Code.²

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.”³ 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

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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).

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 district must withhold the date of birth we marked under section 552.102(a) of the Government Code.

Section 552.101 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 intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. See Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). 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. 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. *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 marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law 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, except as provided by section 552.024(a-1). See Gov't Code §§ 552.117(a)(1), .024. Section 552.024(a-1) of the Government Code provides, "[a] school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-1). Thus, the district may only withhold under section 552.117 the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under

section 552.024. 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. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual at issue did not timely request confidentiality under section 552.024, the district may not withhold the information under section 552.117(a)(1).

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). Upon review, we find portions of the remaining information consist of motor vehicle record information. Accordingly, the district must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Accordingly, the district must withhold the insurance policy numbers we marked under section 552.136 of the Government Code.

In summary, the CR-3 report must be withheld under section 552.101 of the Government Code in conjunction with section 550.065(b). The district must release the redacted CR-3 report to the requestor pursuant to section 552.101 of the Government Code in conjunction with section 550.065(c-1). The district must withhold Tab B pursuant to section 552.101 of the Government Code in conjunction with section 31306 of title 49 of the United States Code and under section 382.405 of title 49 of the Code of Federal Regulations. The district must withhold the date of birth we marked under section 552.102(a) of the Government Code. The district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the employee whose personal information is at issue timely elected to keep her information confidential pursuant to section 552.024 of the Government Code, the district must withhold the information we marked under section 552.117(a)(1) of the Government Code. The district must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The district

must withhold the information we marked under section 552.136 of the Government Code. The district 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,



Emily Buchanan
Assistant Attorney General
Open Records Division

EB/eb

Ref: ID# 645678

Enc. Submitted documents

c: Requestor
(w/o enclosures)