



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 24, 2017

Ms. Lindsey Wolf
General Counsel
Office of the Secretary of State
P. O. Box 12697
Austin, Texas 78711-2060

OR2017-04107

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# 646830.

The Office of the Secretary of State (the "secretary's office") received a request for e-mails sent to or from the secretary's office and the Harris County Tax Assessor during a specified period of time.¹ The secretary's office states it will withhold information pursuant to sections 552.130(c) and 552.147(b) of the Government Code.² You claim some of the submitted information is not subject to the Act. You also claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107,

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).

²Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). 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. *Id.* § 552.147(b).

552.110, 552.136, 552.137, and 552.139 of the Government Code.³ We have considered your arguments and reviewed the submitted representative sample of information.⁴

You argue some of the submitted information is not “public information” subject to disclosure under the Act. Section 552.002(a) of the Government Code defines “public information” as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Gov’t Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You argue some of the submitted information consists of information used solely for the purpose of maintenance, manipulation, or protection of public property and has no other significance. Upon review, we conclude the username and password information we marked is not “public information” for purposes of the Act, and the secretary’s office is not required to release it in response to

³Although we understand you to also raise section 552.022 of the Government Code based on your markings, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under the Act or other law. *See id.* § 552.022.

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.

this request.⁵ The remaining information at issue has significance other than its use as a tool for the maintenance, manipulation, or protection of public property. Accordingly, we conclude the remaining information is “public information” as defined by section 552.002, and it is subject to disclosure under the Act. We will address the arguments against disclosure of that information.

Although you raise section 552.110 of the Government Code, we note section 552.110 protects the interests of third parties that provide information to governmental bodies, not the interests of governmental bodies themselves. *See id.* § 552.110 (excepts from disclosure trade secret or commercial or financial information obtained from third party). *See generally* Open Records Decision No. 592 (1991). Thus, we do not address your argument under section 552.110.

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. The secretary’s office raises the National Voter Registration Act (the “NVRA”), 52 U.S.C. §§ 20501-20511. Section 20507 of title 52 of the United States Code identifies requirements with respect to the administration of voter registration. *See* 52 U.S.C. § 20507. This section provides each state, in the administration of voter registration for elections for federal office, shall “ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.” *Id.* § 20507(a)(6); *see also id.* § 20506 (discussing designation of voter registration agencies under the NVRA). The secretary’s office informs us the information at issue, including the “source code” within the submitted document, contains information pertaining to the voter registration agency in which the named individual registered to vote.

We note the term “identity” for purposes of section 20507(a)(6) is not defined in the NVRA. Therefore, the Code Construction Act requires us to construe this term “according to the rules of grammar and common usage.” Gov’t Code § 311.011(a); *see* Attorney General Opinion JC-0419 at 3 (2001). Statutory construction should focus initially “‘on the literal text of the statute in question’ because ‘the text of the statute is the law.’” *Getts v. State*, 155 S.W.3d 153, 155 (Tex. Crim. App. 2005); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991); Attorney General Opinion GA-0354 at 2 (2005). The Merriam-Webster Dictionary includes a definition of “identity” as “who someone is: the name of a person.” Merriam-Webster Dictionary Online, www.merriam-webster.com/dictionary/identity (last visited June 23, 2016) (providing “simple definition” of “identity”). *See also* 26 U.S.C. § 6103(b)(6) (providing the term “taxpayer identity” means the name of a person with respect to whom a tax return is filed, his mailing address, his taxpayer identifying number, or a combination thereof); Open Records Decision No. 540 at 4 (1990) (finding “[a] name is by common usage often commonly considered the substantial equivalent of identity”).

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

Accordingly, upon review of the submitted information and your representations, because the “source code” information and additional information marked by the secretary’s office contains the name of the agency in which the named individual registered to vote, we find most of this marked information contains the identity of the voter registration agency at issue for purposes of section 20507(a)(6). However, we note the information we have marked for release does not reveal the identity of the voter registration agency through which a voter is registered. Thus, we find you have failed to demonstrate the information at issue is subject to section 20507(a)(6) of title 52 of the United States Code, and the secretary’s office may not withhold the information at issue under section 552.101 of the Government Code on that basis. Therefore, with the exception of the information we have marked for release, the secretary’s office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 20507(a)(6) of title 52 of the United States Code.

Section 552.101 of the Government Code also encompasses section 13.004(c) of the Government Code, which reads, in part, as follows:

The following information furnished on a registration application is confidential and does not constitute public information for purposes of [the Act]:

...

(4) an indication that an applicant is interested in working as an election judge[.]

Elec. Code § 13.004(c)(4). The secretary’s office represents it obtained some of the submitted information from a voter registration application. *See id.* § 18.061(a) (secretary’s office must implement and maintain statewide computerized voter registration list), (c) (each voter registrar must provide to secretary’s office information necessary to maintain registration list established under subsection (a)). Upon review we find none of the remaining information confidential under section 13.004(c)(4), and the secretary’s office may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses section 508.313 of the Government Code, which is applicable to records of the Texas Department of Criminal Justice (“TDCJ”). Section 508.313 provides, in part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of TDCJ] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

...

(c) [TDCJ], on request or in the normal course of official business, shall provide information that is confidential and privileged under Subsection (a) to:

...

(4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

(d) In this section, "eligible entity" means:

(1) a government agency, including the office of a prosecuting attorney[.]

Gov't Code § 508.313(a), (c)(4), (d)(1). Thus, TDCJ may provide information that is encompassed by section 508.313 to an eligible entity, and such information remains confidential in the possession of the entity to which it was provided. *See id.* § 508.313(c)-(d); *see also* Open Records Decision No. 655 at 8 (1997) (information excepted from public disclosure under Act may be transferred between governmental agencies without destroying its confidential character if agency to which information is transferred has authority to obtain it). Upon review, we find the secretary's office has failed to demonstrate the TDCJ provided the information at issue to the secretary's office under section 508.313(d)(1). Accordingly, none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code.

The secretary's office asserts the dates of birth in the remaining information are excepted from public disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* 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 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.⁶ *Tex. 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. Thus, the secretary's office must withhold all public citizens' dates of birth in the remaining information under section 552.101 of the Government Code.

Section 552.103 of the Government Code provides, in 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 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. The test for meeting this burden is showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See Open Records Decision No. 551 at 4 (1990).*

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).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state, and provide supporting documentation showing, prior to the receipt of the instant request, the secretary’s office received an attorney letter alleging violations of the NVRA and corresponding state law. The letter goes on to state “counsel are willing to meet with the [secretary’s office] to assist in your development of a comprehensive plan for full compliance.” The letter states that if the secretary’s office does not remedy the alleged violations, “[counsel] are prepared to pursue litigation as permitted by [the NVRA].” You inform us the secretary’s office formally requested representation from the Office of the Attorney General as a result of the letter. Thus, you assert on the date the secretary’s office received the request for information, the secretary’s office reasonably anticipated litigation to which the secretary’s office would be a party. Based on your representations and our review, we find the secretary’s office reasonably anticipated litigation on the date the request was received. You also represent, and we agree, portions of the submitted information are related to the anticipated litigation for purposes of section 552.103. Accordingly, the secretary’s office may withhold the information you marked under section 552.103 of the Government Code.⁷

We note once the information has been obtained by all parties to the anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You assert some of the submitted information

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

is protected under section 552.104(a). However, upon review, we find you have failed to demonstrate any portion of the information at issue would give advantage to a competitor or bidder. Accordingly, the secretary's office may not withhold any of the information at issue under section 552.104(a) of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The secretary's office states the marked information consists of confidential communications involving the secretary's office's attorneys and staff. We understand the communications were made in furtherance of the rendition of professional legal services to the secretary's office and the confidentiality of the communications have been maintained. Based on these representations and our review, we find the secretary's office has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the secretary's

office may withhold the information you marked under section 552.107(1) of the Government Code.

Section 552.136 of the Government Code 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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Therefore, the secretary’s office must withhold the information we have marked under section 552.136 of the Government Code. However, upon review, we find you have not explained any of the remaining information consists of a credit card, debit card, or charge card number, or is an access device number 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 remaining information. Accordingly, the secretary’s office 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). *See id.* § 552.137(a)-(c). However, section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Additionally, section 552.137 does not apply to the private e-mail addresses of government officials who use their private e-mail addresses to conduct official government business. *Austin Bulldog v. Leffingwell*, No. 03-13-00604-CV, 2016 WL 1407818 (Tex. App.—Austin April 8, 2016, no pet.) (mem. op.). Accordingly, the secretary’s office must withhold the personal e-mail addresses in the remaining information under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release, the e-mail addresses belong to government officials who use their private e-mail addresses to conduct official government business, or subsection (c) applies. However, none of the remaining information you have marked under 552.137 consists of e-mail addresses subject to section 552.137. Accordingly, the secretary’s office may not withhold any of the remaining information at issue under section 552.137 of the Government Code.

Section 552.139 of the Government Code provides, in part:

- (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted

information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency[.]

Id. § 2059.055(b)(1). You assert the information you have marked pertains to technical details of the secretary's office's computer system and relates to the design and operation of the secretary's office's computer network. Upon review, we find you have failed to demonstrate any of the remaining information at issue relates to computer network security, to restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Further, we find you have failed to demonstrate any of the remaining information at issue consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Consequently, the secretary's office may not withhold any of the remaining information at issue under section 552.139 of the Government Code.

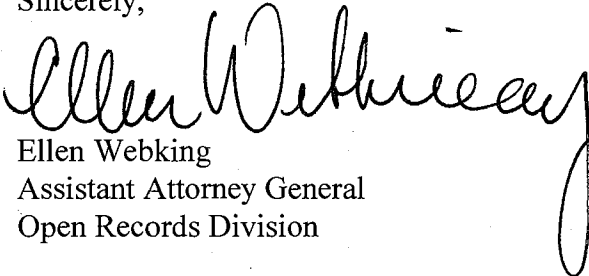
In summary, the username and password information we marked is not "public information" for purposes of the Act, and the secretary's office is not required to release it in response to this request. With the exception of the information we have marked for release, the secretary's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 20507(a)(6) of title 52 of the United States Code. 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. The secretary's office may withhold the information you marked under section 552.103 of the Government Code. The secretary's office may withhold the information you have marked under section 552.107(1) of the Government Code. The secretary's office must withhold the information we have marked under section 552.136 of the Government Code. The secretary's office must withhold the personal e-mail addresses in the remaining information under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release, the e-mail addresses belong to government officials who use their private e-mail addresses to conduct official government business, or subsection (c) applies. 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# 646830

Enc. Submitted documents

c: Requestor
(w/o enclosures)