



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 13, 2017

Mr. L. Brian Narvaez  
Counsel for the Town of Little Elm  
Brown & Hofmeister, L.L.P.  
740 East Campbell Road, Suite 800  
Richardson, Texas 75081

OR2017-05197

Dear Mr. Narvaez:

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# 648629.

The Town of Little Elm (the "town"), which you represent, received a request for information pertaining to the town's red-light camera program and a specified intersection and the personnel file of a named town police officer. You state the town does not maintain some of the requested information.<sup>1</sup> You state the town will redact certain motor vehicle record information under section 552.130(c) of the Government Code.<sup>2</sup> You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.137 of the Government Code. We have also received and considered comments from the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released). We

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<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

<sup>2</sup>Section 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).

have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note some of the remaining information is subject to section 552.022 of the Government Code, which reads, in part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the 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 [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Some of the submitted information consists of completed reports subject to section 552.022(a)(1) and information in an account relating to the receipt or expenditure of public funds and executed contracts subject to section 552.022(a)(3). Although the town seeks to withhold this information under section 552.103, this section is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; *Open Records Decision No. 542* at 4 (1990) (statutory predecessor to section 552.103 may be waived). Therefore, the town may not withhold the information subject to section 552.022, which we have marked, under section 552.103. As you raise no further exceptions to disclosure of this information, the information we have marked must be released pursuant to section 552.022 of the Government Code.

The town asserts the remaining information in Exhibit B is excepted from disclosure under section 552.103 of the Government Code, which provides, in part, as follows:

(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.

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<sup>3</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499* (1988), *497* (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

...

(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 documents to show section 552.103 is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *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.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The town informs us, and provides documentation showing, prior to the town's receipt of the request for information, a lawsuit styled *Watson v. City of Allen, et al.*, No. 153-278080-15, was filed and is currently pending against the town in the 153rd Judicial District Court of Tarrant County Texas. However, the requestor asserts the town was removed as a defendant on July 29, 2015, and, thus, section 552.103 is not applicable.<sup>4</sup> Whether litigation was pending at the time of the request is a question of fact. This office cannot resolve questions of fact in the open records process but, instead, must rely on the representations of the governmental body requesting our opinion. See generally Open Records Decision Nos. 554 (1990), 552 (1990). We note the town has submitted a copy of the Plaintiff's Sixth Amended Petition, which names the town as a defendant, and the petition was served on September 4, 2016. Therefore, based on the town's representations and the submitted petition, we conclude the town has established litigation was pending when the town received the request. Further, the town states, and we agree, the remaining information in Exhibit B is related to the pending litigation for purposes of section 552.103. Therefore, the town may withhold the remaining information in Exhibit B under section 552.103 of the Government Code.

However, once the information has been obtained by all parties to the litigation, 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 has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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<sup>4</sup>We note the requestor may be referring to a lawsuit styled *Watson v. City of Allen, et al.*, Civil Action No. 4:15-CV-00335-A, filed in the United States District Court for the Northern District of Texas.

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 section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders federal tax return information confidential. *See Open Records Decision No. 600 (1992) (W-4 forms)*. Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, 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 with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]” *See 26 U.S.C. § 6103(b)(2)(A)*. 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). Thus, the submitted W-4 forms constitute tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code. This section makes confidential L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement (“TCOLE”). Section 1701.306 provides the following:

(a) [TCOLE] may not issue a license to a person unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a blood test or other medical test.

(b) An agency hiring a person for whom a license is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to [TCOLE]. A declaration is not public information.

Occ. Code § 1701.306(a)-(b). Therefore, the town must withhold the submitted L-2 declaration form under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 600 at 9-10 (1992) (employee's withholding allowance certificate, designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 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). However, this office has concluded the public has a legitimate interest in information that relates to applicants and public employees and their qualifications and job performance, especially where the applicant was seeking a position in law enforcement. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private). We further note the scope of a public employee's privacy is narrow. *See* Open Records Decision No. 423 at 2 (1984).

Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the town must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>5</sup>

We note the remaining information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.<sup>6</sup> Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly

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<sup>5</sup>As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

<sup>6</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). Upon review, we find the town must withhold the date of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, social security number, emergency contact information, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov’t Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We note section 552.117(a)(2) encompasses a peace officer’s personal cellular telephone and pager numbers if the officer personally pays for the cellular or pager service. *See* Open Records Decision No. 670 at 6 (2001); *see also* Open Records Decision No. 506 at 5-6 (1998) (Gov’t Code § 552.117 not applicable to cellular mobile telephone numbers paid for by governmental body and intended for official use). Accordingly, the town must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(2); however, the town may only withhold the marked personal cellular number under section 552.117(a)(2) if a governmental body does not pay for the cellular telephone service.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the town must withhold the e-mail addresses you have marked and the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the information we have marked must be released pursuant to section 552.022 of the Government Code. The town may withhold the remaining information in Exhibit B under section 552.103 of the Government Code. The town must withhold the submitted W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The town must withhold the submitted L-2 declaration form under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The town must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The town must withhold the date of birth we have marked under section 552.102(a) of the Government Code. The town must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(2) of the Government Code; however, the town may only withhold the marked personal cellular number under section 552.117(a)(2) if a governmental body does not pay for the cellular telephone service. The town must withhold the e-mail addresses you have marked and the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail

addresses affirmatively consent to their disclosure. The remaining information must be released.

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](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,



Meagan J. Conway  
Assistant Attorney General  
Open Records Division

MJC/bw

Ref: ID# 648629

Enc. Submitted documents

c: Requestor  
(w/o enclosures)