



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 19, 2017

Ms. Kristen Lee
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2017-08381

Dear Ms. Lee:

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# 654086 (Ref. No. 17PIA0025).

Harris County (the "county") received two requests from the same requestor for communications pertaining to a specified topic between the county clerk's office and the county tax assessor's office during a specified time period. You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.117, 552.1175, 552.130, 552.137, and 552.147 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, 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:

¹We assume that 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.

- (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. Based on your representations and our review, we find the information we have marked is not "public information" for purposes of the Act, and the county is not required to release it in response to this request. However, 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 is subject to disclosure under the Act.

Next, we must address the county's procedural obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See id.* § 552.301(a), (b). In this instance, you state, and submit documentation demonstrating, the county received the requests for information on January 11, 2017. You state the county was closed on January 16, 2017. This office does not count the date the request was received or days a governmental body is closed for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the county's ten-business-day deadline was January 26, 2017. However, you did not request a ruling from this office until February 2, 2017. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Consequently, we find the county failed to comply with the requirements of section 552.301 in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). The county claims sections 552.101, 552.107, 552.108, 552.111, 552.117, 552.1175, 552.130, and 552.137 of the Government Code for the submitted information. Because some of your claims under section 552.101, as well as your claims under sections 552.107, 552.117, 552.1175, 552.130, and 552.137, can provide compelling reasons to overcome the presumption of openness, we will address these claims against disclosure of the submitted information. However, we find you have failed to establish a compelling reason to address your remaining claims against disclosure.

Next, we note some of 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:

...

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases[.]

Gov't Code § 552.022(a)(12). The submitted information contains a final opinion of a court that is subject to section 552.022(a)(12). This information must be released unless it is made confidential under the Act or other law. You seek to withhold the information subject to section 552.022(a)(12) under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the court opinion may not be withheld under section 552.107 of the Government Code. However, we note the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(12).

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).

You assert the information subject to section 552.022 of the Government Code consists of an attachment to an e-mail communication between county attorneys, outside attorneys for the county, and county employees for the purpose of facilitating the rendition of professional legal services to the county. You state the communication was intended to be confidential and has remained confidential. Upon review, we find the county has established the

information subject to section 552.022 constitutes a privileged attorney-client communication that it may withhold under rule 503 of the Texas Rules of Evidence.

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.”² 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 (Tex. 2010). Upon review, we find the county must withhold the date of birth we have marked under section 552.102(a) of the Government Code.³

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. Section 552.101 encompasses section 13.004(c) of the Election Code, which reads, in part:

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 county represents it obtained some of the remaining 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)). The county must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 13.004(c)(4) of the Election Code. However, the remaining information at issue is not confidential under section 13.004(c)(4), and the county may not withhold it under section 552.101 on that ground.

²The 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).

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.101 of the Government Code also encompasses section 32.076 of the Election Code, which provides as follows:

(a) Except as provided by Subsection (b), an e-mail address or personal phone number of an election judge or clerk collected or maintained by the authority conducting the election is confidential and does not constitute public information for purposes of [the Act].

(b) An e-mail address or phone number described by Subsection (a) shall be made available on request to:

(1) any entity eligible to submit lists of election judges or clerks for that election; or

(2) the state executive committee of a political party with a county chair eligible to submit lists of election judges or clerks for that election.

Id. § 32.076. You assert some of the remaining information is subject to section 32.076(a). Further, we have no indication the exceptions in section 32.076(b) apply in this instance. Upon review, we find the personal phone numbers and e-mail addresses in the information you have indicated are confidential under section 32.076 of the Election Code and must be withheld under section 552.101 of the Government Code. However, we find you have failed to demonstrate any of the remaining information you have indicated consists of an e-mail address or personal phone number of an election judge or clerk collected or maintained by the authority conducting the election. Thus, the county may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 32.076 of the Election 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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). 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. 600 (1992) (employee's 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), 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). A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See 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.).

However, the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to a deceased individual. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded” (quoting RESTATEMENT (SECOND) OF TORTS § 652I (1977))); Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (“the right of privacy is personal and lapses upon death”). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the county must withhold the information we have marked and all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.⁴ However, we find the remaining information at issue either pertains to a deceased individual or does not otherwise satisfy the standard articulated in *Industrial Foundation*. Therefore, the county may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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

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

issue. ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

You state some of the submitted information not subject to section 552.022 of the Government Code consists of communications between county attorneys, outside attorneys for the county, and county employees that were made for the purpose of providing legal services to the county. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information you have indicated that is not subject to section 552.022 consists of privileged attorney-client communications the county may withhold under section 552.107(1) of the Government Code.

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)*. Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)*. 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 employees at issue timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the county may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. Conversely, to the extent the employees at issue did not timely request confidentiality under section 552.024, the county may not withhold the information we have marked under section 552.117(a)(1). Further, we find none of the remaining information is subject to section 552.117, and the county may not withhold any of the remaining information under section 552.117 of the Government Code.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. Gov't Code § 552.1175. Upon review, we find you have failed to demonstrate

any of the remaining information is subject to section 552.1175 of the Government Code. Therefore, the county may not withhold any of the remaining information under section 552.1175 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 id.* § 552.130. Upon review, we find the information we have marked consists of motor vehicle record information subject to section 552.130. Therefore, the county must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. However, you have failed to demonstrate any of the remaining information at issue is subject to section 552.130. Thus, the county may not withhold any of the remaining information at issue under section 552.130 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). 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). Upon review, we find the county must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure or subsection (c) applies.

In summary, the information we have marked is not subject to the Act and need not be released in response to the instant request. The county may withhold the information subject to section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence. The county must withhold the date of birth we have marked under section 552.102(a) of the Government Code. The county must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 13.004(c)(4) of the Election Code. The county must withhold the personal phone numbers and e-mail addresses in the information you have indicated under section 552.101 of the Government Code in conjunction with section 32.076 of the Election Code. The county must withhold the information we have marked and all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The county may withhold the information you have indicated that is not subject to section 552.022 of the Government Code under section 552.107(1) of the Government Code. To the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the county may only withhold the

marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. The county must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The county must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure or subsection (c) applies. The county must release the remaining information.⁵

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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/bw

Ref: ID# 654086

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the remaining information contains social security numbers; however, some of the social security numbers belong to deceased individuals. Although section 552.147(b) of the Government Code authorizes a governmental body to redact living persons' social security numbers from public release without the necessity of requesting a decision from this office under the Act, this section does not apply to the social security numbers of deceased individuals. Gov't Code § 552.147(b). Therefore, the county may only withhold social security numbers of living individuals under section 552.147 of the Government Code.