



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 12, 2017

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

OR2017-10298

Dear Ms. Aston:

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# 657337.

The Office of the Secretary of State (the "secretary's office") received a request for all election complaint documents and notices and all communications to and from the secretary of state that include a specified term.¹ You state you have released some information to the requestor. We understand you will redact information under sections 552.130(c) and 552.147(b) of the Government Code.² You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.117,

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).

²We note 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). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See id.* § 552.147(b).

and 552.137 of the Government Code. You inform us you notified the Office of the Attorney General (the "OAG") of its right to submit comments to this office explaining why the submitted information should not be released. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). We have received comments from the OAG. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, you indicate some of the submitted information, which you marked, is not responsive to the present request. This ruling does not address the public availability of the non-responsive information and the secretary's office need not release it in response to this request.

We note the some of the submitted information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2017-08907 (2017). In that ruling, we determined the secretary's office may withhold the information the OAG indicated under section 552.108(a)(1) of the Government Code, but must release the remaining information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the secretary's office may continue to rely on Open Records Letter No. 2017-08907 as a previous determination and withhold the information at issue, which we marked, in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider your arguments for the submitted information not subject to the previous ruling.

Section 552.103 of the Government Code provides 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.

...

³We 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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The secretary's office states, and provides documentation showing, a lawsuit styled *Veasey v. Abbot*, Cause No. 14-41127, was pending against the secretary's office in the United States District Court for the Southern District of Texas, when it received the instant request for information. You state the information you marked is related to the pending lawsuit. Based on your representations, the submitted documentation, and our review of the responsive information, we find litigation was pending when the secretary's office received this request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, the secretary's office may withhold the information you marked under section 552.103(a) of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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).

You state the information you marked consists of communications between secretary’s office attorneys and secretary’s office employees. You also indicate these communications were intended to be confidential and that the confidentiality has been maintained. Upon review, we find the secretary’s office has demonstrated the applicability of the attorney-client privilege to the information you marked. Thus, the secretary’s office may withhold the information you marked under section 552.107(1) of the Government Code.⁴

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 20507 of title 52 of the United States Code, which 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 “source code” within the

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

submitted documents 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 September 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”). Accordingly, upon review of the submitted information and your representations, because the information marked by the secretary’s office contains the name of the agency in which the named individual registered to vote, we find this information contains the identity of the voter registration agency at issue for purposes of section 20507(a)(6). Thus, the secretary’s office must withhold this information under section 552.101 of the Government Code in conjunction with section 20507(a)(6) of title 52 of the United States Code.

You assert the submitted W-9 form is confidential under section 6103(a) of title 26 of the United States Code, which is encompassed by section 552.101 of the Government Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). 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). However, W-9 tax forms are requests for taxpayer identification numbers and do not fall within the definition of “tax return information.” Therefore, the secretary’s office may not withhold the submitted W-9

tax form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

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.

Elec. Code § 32.076. Upon review, we find the information you marked consists of the personal phone numbers of election judges or clerks collected or maintained by the authority conducting the election. Further, we find none of the exceptions in section 32.076(b) apply in this instance. Therefore, the information you marked is confidential under section 32.076 of the Election Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 31.006 of the Election Code. Section 31.006 of the Election Code provides the following:

(a) If, after receiving a complaint alleging criminal conduct in connection with an election, the [secretary's office] determines that there is reasonable cause to suspect that the alleged criminal conduct occurred, the secretary shall promptly refer the complaint to the [OAG]. The secretary shall deliver to the [OAG] all pertinent documents in the secretary's possession.

(b) The documents submitted under Subsection (a) are not considered public information until:

(1) the [secretary's office] makes a determination that the complaint received does not warrant an investigation; or

(2) if referred to the [OAG], the [OAG] has completed the investigation or has made a determination that the complaint referred does not warrant an investigation.

Id. § 31.006. You state the remaining information you marked was delivered to the OAG pursuant to section 31.006. You inform us the information is either still under investigation with the OAG or still being reviewed by the secretary's office. Based on your representations and our review, we agree the information at issue is not considered public under section 31.006(b). Accordingly, the secretary's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code.⁵

Section 552.101 of the Government Code also encompasses section 273.001 of the Election Code, which provides, in relevant part, the following:

(a) If two or more registered voters of the territory covered by an election present affidavits alleging criminal conduct in connection with the election to the county or district attorney having jurisdiction in that territory, the county or district attorney shall investigate the allegations. If the election covers territory in more than one county, the voters may present the affidavits to the [OAG], and the [OAG] shall investigate the allegations.

(b) A district or county attorney having jurisdiction or the [OAG] may conduct an investigation on the officer's own initiative to determine if criminal conduct occurred in connection with an election.

...

(e) Not later than the 30th day after the date on which a county or district attorney begins an investigation under this section, the county or district attorney shall deliver notice of the investigation to the [secretary's office]. The notice must include a statement that a criminal investigation is being conducted and the date on which the election that is the subject of the investigation was held. The [secretary's office] may disclose information relating to a criminal investigation received under this subsection only if the county or district attorney has disclosed the information or would be required by law to disclose the information.

Id. § 273.001(a), (b), (e). You assert some of the remaining information is confidential under section 273.001(e) of the Election Code. We understand the information at issue consists

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

of notices from the OAG that were delivered to the secretary's office pursuant to section 273.001(e). *See id.* § 273.001(e). You state the secretary's office has no indication the OAG has disclosed the information or would be required by law to disclose the information. Based on your representations and our review, we agree the information at issue is confidential under section 273.001(e). Accordingly, the secretary's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 273.001(e) of the Election Code.⁶

Section 552.101 of the Government Code also encompasses section 13.004 of the Election Code, which pertains to voter qualifications and registration. Section 13.004 of the Election Code provides, in relevant part, the following:

(a) The registrar may not transcribe, copy, or otherwise record a telephone number furnished on a registration application.

...

(c) 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[.]

Id. § 13.004(a), (c)(4). You assert the information you marked is excepted from public disclosure under section 552.101 of the Government Code in conjunction with section 13.004 of the Election Code. Upon review, we find the information you marked is confidential under section 13.004(c)(4) of the Election Code. Accordingly, the secretary's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 13.004(c) of the Election Code.

Section 552.101 of the Government Code 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. The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *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.). Thus, the

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

secretary's office must withhold all public citizens' dates of birth under section 552.101 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* Gov't Code § 552.137(a)-(c). Accordingly, the secretary's office must withhold the personal e-mail addresses you marked under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release.⁷ *See id.* § 552.137(b).

In summary, the secretary's office may continue to rely on Open Records Letter No. 2017-08907 as a previous determination and withhold or release the information at issue in accordance with that ruling. The secretary's office may withhold the information you marked under section 552.103(a) of the Government Code. The secretary's office may withhold the information you indicated under section 552.107(1) of the Government Code. The secretary's office must withhold 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 the information you indicated under section 552.101 of the Government Code in conjunction with section 32.076 of the Election Code. The secretary's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code. The secretary's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 273.001(e) of the Election Code. The secretary's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 13.004(c) of the Election Code. The secretary's office must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The secretary's office must withhold the personal e-mail addresses you marked under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. 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/>

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

[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,

A handwritten signature in black ink that reads "Ashley Crutchfield". The signature is written in a cursive, flowing style.

Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/bw

Ref: ID# 657337

Enc. Submitted documents

c: Requestor
(w/o enclosures)