



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 2, 2019

Mr. Cary D. Kirby  
County Attorney  
Angelina County  
P.O. Box 1845  
Lufkin, Texas 75902-1845

OR2019-08853

Dear Mr. Kirby:

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# 757453.

The Angelina County Commissioner Precinct Two (the "commissioner") received a request for three categories of information pertaining to a named individual. You state the commissioner does not possess some of the requested information.<sup>1</sup> You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.130, 552.136, and 552.147 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Regardless of whether the commissioner complied with section 552.301, we note sections 552.101, 552.102, and 552.130 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information. *See Gov't Code* §§ 552.007, .302, .352. We note 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 under the Act. *See id.* § 552.147(b).

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[.]” Gov’t Code § 552.102(a). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert*’s interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts*, 354 S.W.3d 336. The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find the commissioner must withhold the date of birth we marked under section 552.102(a) of the Government Code.<sup>3</sup> However, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the commissioner may not withhold any of the remaining information on that basis.

We note some of the remaining information may be subject to section 552.117 of the Government Code.<sup>4</sup> 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). We note a post office box number is not a “home address” for purposes of section 552.117(a). *See Open Records Decision No. 622 at 4 (1994)* (legislative history makes clear that purpose of Gov’t Code § 552.117 is to protect public employees from being harassed at home). 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

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

<sup>4</sup>The 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 No. 481 (1987), 480 (1987), 470 (1987)*.

timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the commissioner must withhold the information we marked under section 552.117(a)(1) of the Government Code.<sup>5</sup> Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, the commissioner may not withhold the information under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by this state or another state or country. Gov't Code § 552.130(a)(1), (2). Accordingly, the commissioner must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

Section 552.136(b) 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, however, we find you have not demonstrated 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 of the Government Code to any of the remaining information and the commissioner may not withhold any of it on that basis.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This exception encompasses section 6103(a) of title 26 of the United States Code. *See* 26 U.S.C. § 61.03(a); *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993); Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as encompassing “a taxpayer’s identity, the nature, source, or amount of 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 . . . or offense[.]” 26 U.S.C. § 6103(b)(2)(A). *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*

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

*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-2 and 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. However, the remaining information you indicated does not fall under the definition of tax return information. See 26 U.S.C. § 6103(b)(2)(A). Therefore, this information is not confidential under section 6103(a) of title 26 of the United States Code and may not be withheld on that basis.

Section 552.101 of the Government Code also encompasses section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. See 8 U.S.C. § 1324a(b)(5); see also 8 C.F.R. § 274a.2(b)(4). In this instance, release of the submitted I-9 form would be “for purposes other than for enforcement” of the referenced federal statutes. Thus, we find the submitted I-9 form is confidential pursuant to section 1324a of title 8 of the United States Code. Accordingly, the commissioner must withhold the submitted I-9 forms and the information appended to the I-9 forms under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 of the Government Code also encompasses information made confidential by section 411.034 of the Labor Code, which provides in pertinent part:

- (a) The identity of an employee in a report filed under Section 411.032 is confidential and may not be disclosed as part of the job safety information system.
- (b) A person commits an offense if the person knowingly, intentionally, or recklessly publishes, discloses, or distributes information that is confidential under this section to a person not authorized to receive the information.
- (c) A person commits an offense if the person knowingly, intentionally, or recklessly receives information that is confidential under this section and that the person is not authorized to receive.

Labor Code § 411.034(a)-(c). Section 411.032(a) provides:

- (a) an employer shall file with the [division of worker’s compensation of the Texas Department of Insurance (the “division”)] a report of each:
  - (1) on-the-job injury that results in the employee’s absence from work for more than one day; and

(2) occupational disease of which the employer has knowledge.

*Id.* § 411.032(a). These statutes make confidential the identity of an employee who suffers an on-the-job injury or occupational disease reported to the division. The commissioner has failed to demonstrate the information at issue includes a report filed under section 411.032(a). Therefore, section 411.034 is inapplicable, and none of the remaining information may be withheld under section 552.101 of the Government Code on this basis. *See id.* § 411.034(a).

Section 552.101 of the Government Code also encompasses information made confidential by section 231.108 of the Family Code, which pertains to the administration of Title IV-D child support programs and provides the Office of the Attorney General (the “OAG”) is designated as the state’s Title IV-D agency. *See* Fam. Code § 231.001. Section 231.108(a) of the Family Code provides:

(a) . . . all files and records of services provided by the Title IV-D agency under this title, including information concerning a custodial parent, a noncustodial parent, a child, or an alleged or presumed father, are confidential.

*Id.* § 231.108(a). In this instance, you state Exhibit K was shared between the commissioner and the OAG. We understand the commissioner uses this information for the administration and enforcement of a child support program. *See id.* § 231.108(c) (allowing the OAG to release information subject to chapter 231 of the Family Code for purposes directly connected with the administration of child support programs). Based on your arguments and our review of the information at issue, we conclude that the commissioner must withhold Exhibit K from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 231.108 of the Family 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). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the commissioner must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the commissioner has failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the commissioner may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the remaining information, we find you have failed to demonstrate any portion of the information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the commissioner may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of constitutional privacy.

In summary, the commissioner must withhold the date of birth we marked under section 552.102(a) of the Government Code. To the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the commissioner must withhold the information we marked under section 552.117(a)(1) of the Government Code. The commissioner must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The commissioner must withhold the submitted W-2 and 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 commissioner must withhold the submitted I-9 forms and the information appended to the I-9 forms under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The commissioner must withhold Exhibit K under section 552.101 of the Government Code in conjunction with section 231.108 of the Family Code. The commissioner must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commissioner 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](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,

A handwritten signature in cursive script, appearing to read "Ashley Crutchfield".

Ashley Crutchfield  
Assistant Attorney General  
Open Records Division

AC/mo

Ref: ID# 757453

Enc. Submitted documents

c: Requestor  
(w/o enclosures)