



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 5, 2019

Ms. Heather Stebbins  
Attorney  
Kerr County Attorney's Office  
700 Main Street, Suite BA-103  
Kerrville, Texas 78028

OR2019-31142

Dear Ms. Stebbins:

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# 795616.

Kerr County (the "county") received a request for fifteen categories of information pertaining to the requestor's client and a named county employee, including personnel information, performance evaluations, communications, and information pertaining to a specified investigation, as well as three categories of information pertaining to the county's Road and Bridge Department during stated periods of time. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note some of the information at issue is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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<sup>1</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 those records contain substantially different types of information than that submitted to this office.

[T]he 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[.]

Gov't Code § 552.022(a)(1). The submitted information contains a completed investigation and evaluations subject to section 552.022(a)(1) of the Government Code. The county must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. Although the county raises section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022(a)(1) may be withheld under section 552.103. However, because section 552.117 of the Government Code makes information confidential under the Act, we will address the applicability of this section to the information at issue.<sup>2</sup> Additionally, we will consider your argument under section 552.103 for the information not subject to section 552.022.

Section 552.103 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

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<sup>2</sup> The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to 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 parts of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter, prior to it's receipt of a request for information, containing a specific threat to sue the governmental body from an attorney for a potential opposing party, or an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You assert the county reasonably anticipated litigation on the date it received the present request for information because the requestor is an attorney representing a former employee and the present request includes a letter of representation regarding an “Investigation of Defamation.” However, upon review, we find you have not established any party had taken concrete steps toward filing litigation or that the county was a party to any litigation which was pending when the county received the present request for information. Thus, we conclude you have failed to demonstrate the applicability of section 552.103 of the Government Code to the information at issue, and the county may not withhold any portion of the remaining information 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.” Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 6103(a) of title 26 of the United States Code, which renders federal tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as follows:

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[.]

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), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Nevertheless, section 6103(e) creates an exception to confidentiality under section 6103(a) and provides for disclosure of tax return information to the taxpayer. *See* 26 U.S.C. § 6103(e)(7) (information may be disclosed to any person authorized by subsection (e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under federal Freedom of Information Act). Thus, the requestor has a right of access to his client's return information pursuant to § 6103(e), and it may not be withheld from him under § 6103(a). Accordingly, the county must withhold the W-4 forms we marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.102(a) of the Government Code exempts 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). The Texas Supreme Court held section 552.102(a) exempts 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). We note the requestor has a right of access to his client's date of birth under section 552.023 of the Government Code and it may not be withheld from him under section 552.102. *See* Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, the county must withhold the employee's date of birth we marked under section 552.102(a) of the Government 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 also 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 (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), 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), 455 at 9 (employment applicant's salary information not private), 423 at 2 (1984) (scope of public employee privacy is narrow), 373 (1983) (sources of income not related to financial transactions between individual and governmental body protected under common-law privacy). We also note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions 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), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). However, we note the requestor has a right of access to information pertaining to his client that would otherwise be confidential under common-law privacy. *See* Gov't Code § 552.023; ORD 481 at 4. 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 marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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 section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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. We note section 552.117 protects personal privacy, and the requestor's client is one of the individuals whose information is at issue. Thus, the requestor has a right of access to information pertaining to his client pursuant to section 552.023 of the Government Code, and the county may not withhold such information under section 552.117 of the Government Code. *See* Gov't Code § 552.023; ORD 481 at 4. Accordingly, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we marked and indicated under section 552.117(a)(1) of the Government Code; however, the cellular telephone numbers at issue may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the county may not withhold the information at issue under section 552.117(a)(1).

Section 552.130 of the Government Code excepts from public disclosure information relating to a motor vehicle operator's or driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country. *See* Gov't Code § 552.130. We note section 552.130 is designed to protect the privacy of individuals. Thus, the requestor has a right of access to his client's motor vehicle record information and it may not be withheld from him under section 552.130. *See id.* § 552.023; ORD 481 at 4. Accordingly, the county must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

In summary, the county must withhold the W-4 forms we marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The county must withhold the employee's date of birth we marked under section 552.102(a) of the Government Code. The county must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we marked and indicated under section 552.117(a)(1) of the Government Code; however, the cellular telephone numbers at issue may be withheld only if a governmental body does not pay for the cellular telephone service. The county must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The county must release the remaining information to this requestor.<sup>3</sup>

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.

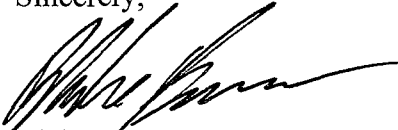
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

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<sup>3</sup> As noted above, the requestor has a special right of access to some of the information being released in this instance. *See* Gov't Code § 552.023(a); ORD 481 at 4; *see also* Gov't Code § 552.137(b). Because such information is confidential with respect to the general public, if the county receives another request for this information from a different requestor, the county must again seek a ruling from this office.

responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Blake Brennan', written in a cursive style.

Blake Brennan  
Assistant Attorney General  
Open Records Division

BBX/rm

Ref: ID# 795616

Enc. Submitted documents

c: Requestor  
(w/o enclosures)