



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 10, 2020

Ms. Debbie Thomas  
City Secretary  
City of Alvarado  
104 West College  
Alvarado, Texas 76009

OR2020-03930

Dear Ms. Thomas

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# 810794.

The City of Alvarado (the "city") received a request for seven categories of information pertaining to the requestor's client. You state you will withhold certain information pursuant to sections 552.130 and 552.147 of the Government Code, as well as Open Records Decision No. 684 (2009).<sup>1</sup> You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the Texas Commission

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<sup>1</sup> Section 552.130(c) 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 under the Act. *Id.* § 552.147(b). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information without the necessity of requesting an attorney general decision, including: L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306(b) of the Occupations Code and personal e-mail addresses under section 552.137 of the Government Code. *See* ORD 684.

of Law Enforcement (“TCOLE”) under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) All information submitted to [TCOLE] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [TCOLE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. Section 1701.4525 of the Occupations Code also reads, in part, as follows:

(a) A person who is the subject of an employment termination report maintained by [TCOLE] under this subchapter may contest information contained in the report by submitting to the law enforcement agency and to [TCOLE] a written petition on a form prescribed by [TCOLE] for a correction of the report not later than the 30th day after the date the person receives a copy of the report. On receipt of the petition, [TCOLE] shall refer the petition to the State Office of Administrative Hearings [“SOAH”].

...

(e) In a proceeding to contest information in an employment termination report for a report based on alleged misconduct, an administrative law judge shall determine if the alleged misconduct occurred by a preponderance of the evidence regardless of whether the person who is the subject of the report was terminated or the person resigned, retired, or separated in lieu of termination. If the alleged misconduct is not supported by a preponderance of the evidence, the administrative law judge shall order [TCOLE] to change the report. [TCOLE] shall send the changed report to the law enforcement agency that prepared the original employment termination report. The law enforcement agency shall replace the original employment termination report with the changed report.

*Id.* § 1701.4525(a), (e); *see also* 37 T.A.C. § 217.8 (contesting employment termination report). Upon review, we find section 1701.454 is applicable to the submitted Separation of Licensee (F-5) Report forms, Petition to Correct Separation of Licensee Report form, and SOAH’s Decision and Order, which were submitted to TCOLE pursuant to subchapter J of chapter 1701 of the Occupations Code. Thus, the city must withhold this information, which we have marked under section 552.101 in conjunction with section 1701.454. However, we find the city has not established the remaining information is confidential under section 1701.454 and may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center (the “NCIC”) or by the Texas Crime Information Center is confidential

under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). *See generally* Gov’t Code §§ 411.081-.1409. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter E-1 or F of the Government Code. *See* Gov’t Code § 411.083(a). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. However, section 411.083 does not apply to active warrant information or other information relating to one’s current involvement with the criminal justice system. *See* Gov’t Code § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in criminal justice system). We also note the term CHRI does not include driving record information. *See id.* § 411.082(2)(B). Accordingly, the city must withhold the CHRI we have marked under section 552.101 in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which provides in pertinent part, the following:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343

(1982). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004. Upon review, we find the city must withhold the medical records we have marked under section 552.101 in conjunction with the MPA.<sup>2</sup>

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 Third 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.). We note the requestor has a special right of access to her client's information that would ordinarily be withheld to protect her client's privacy interests. *See* Gov't Code § 552.023(a)-(b) (governmental body may not deny access to person or person's representative to whom information relates on grounds that information is considered confidential under privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Thus, with the exception of the requestor's client's date of birth, the city must withhold all public citizens' dates of birth in the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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). 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.*, meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure

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<sup>2</sup> This ruling does not affect an individual's right of access to a patient's medical records from the physician who provided treatment under the MPA. *See* Occ. Code §§ 159.004-.006; *cf. Abbott v. Tex. State Bd. of Pharmacy*, 391 S.W.3d 253 (Tex. App.—Austin 2012, no pet.) (MPA does not provide patient general right of access to his or her medical records from governmental body responding to request for information under Public Information Act).

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 a portion of the submitted information consists of communications involving attorneys hired by the city and employees of the city in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the city. You also state these communications were confidential and do not indicate the city has waived the confidentiality of the information at issue. Based on these representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to some of the information at issue, which we have marked. Accordingly, the city may withhold the information we marked under section 552.107(1). However, upon review, we find you have failed to establish the remaining information constitutes communications between or among city employees and attorneys for the purposes of section 552.107(1). Thus, the city may not withhold the remaining information under section 552.107(1).

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.<sup>3</sup> Gov’t Code § 552.1175. Upon review, we find the information we have marked consists of personal information of individuals who may be among the types of individuals listed in section 552.1175(a) and whose information is not held by the city in an employment capacity. Thus, if the information we have marked under section 552.1175 relates to individuals to whom section 552.1175 applies and the individuals elect to restrict access to the information in accordance with section 552.1175(b), then the city must withhold the marked information under section 552.1175.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The city must withhold the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA. The city must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. With the exception of the requestor’s client’s date of birth, the city must withhold all public citizens’ dates of birth in the remaining information under section 552.101 of the Government Code in conjunction with common-

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<sup>3</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 Nos. 481 (1987), 480 (1987), 470 (1987).

law privacy. The city may withhold the information we marked under section 552.107(1) of the Government Code. If the information we have marked relates to individuals to whom section 552.1175 of the Government Code applies and the individuals elect to restrict access to the information in accordance with section 552.1175(b), the city must withhold the marked information under section 552.1175. The city must release the remaining information.<sup>4</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 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,



Pearlie Gault  
Attorney  
Open Records Division

PG/eb

Ref: ID# 810794

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup> We note the requestor has a right of access beyond that of the general public to some of the information being released that pertains to the requestor's client. See Gov't Code § 552.023(a) ORD 481 at 4. Accordingly, if the city receives another request for this information from an individual other than this requestor or her client, the city must again seek a ruling from this office.