



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 16, 2020

Ms. Cheryn L. Netz  
Assistant General Counsel  
Texas State Securities Board  
P.O. Box 13167  
Austin, Texas 78711-3167

OR2020-17781

Dear Ms. Netz:

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# 833746.

The Texas State Securities Board (the "board") received a request for personnel, travel, and time records pertaining to a named individual. You state the board is releasing some information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also inform us the board has notified the Federal Bureau of Investigation (the "FBI") of the request for information and of its right to submit arguments to this office as to why some of the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the FBI and from the requestor.<sup>1</sup> We have reviewed the submitted arguments and the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>Although the FBI generally raises section 552.101 of the Government Code, it does not direct us to, nor are we aware of, any statutes that make the information the FBI seeks to withhold confidential. Accordingly, we do not address the FBI's general assertion of section 552.101 for its information.

<sup>2</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.

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 section encompasses information protected by other statutes. Article 581-28(A) of the Texas Securities Act (the “TSA”) provides, in pertinent part:

Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect the violation of [the TSA] or a Board rule or order. For this purpose, the Commissioner may require, by subpoena or summons issued by the Commissioner, the attendance and testimony of witnesses and the production of all records, whether maintained by electronic or other means, relating to any matter which the Commissioner has authority by [the TSA] to consider or investigate, and may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence; provided, however, that all information of every kind and nature received in connection with an investigation and all internal notes, memoranda, reports, or communications made in connection with an investigation shall be treated as confidential by the Commissioner and shall not be disclosed to the public except under order of court for good cause shown.

V.T.C.S. art. 581-28(A). You state the information you marked in Exhibits B-1 and B-2 was made by the board in connection with an investigation to prevent or detect a violation of the TSA or board rule or order. Based on your representations and our review of the information at issue, we agree this information consists of internal notes, memoranda, reports, or communications made in connection with an investigation. Accordingly, the board must withhold the information you marked in Exhibits B-1 and B-2 under section 552.101 of the Government Code in conjunction with article 581-28(A) of the TSA.

Section 552.101 of the Government Code also encompasses the Family and Medical Leave Act (the “FMLA”). *See* 29 U.S.C. §§ 2601 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Section 825.500(g) reads as follows:

Records and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (*see* 29 C.F.R. 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA. If the [Americans with Disabilities Act (the “ADA”)], as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You state Exhibit C is confidential under section 825.500 of title 29 of the Code of Federal Regulations. You further state the release provisions of the FMLA are not applicable to this information. Upon review, we agree the board must withhold Exhibit C under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 of the Government Code also encompasses information protected by 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. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 545 (1990) (common-law privacy protects mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information). Upon review, we agree Exhibits D-1, D-2, and D-3 satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the board must withhold Exhibits D-1, D-2, and D-3 under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere

with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

The FBI objects to the disclosure of some of the information in Exhibit E-1 because release would interfere with its law enforcement efforts. Upon review, we agree the release of some of the information at issue, which we indicated, would interfere with law enforcement. Accordingly, the board may withhold the information we indicated in Exhibit E-1 under section 552.108(b)(1) of the Government Code. However, we find the FBI has not demonstrated release of any of the remaining information would interfere with law enforcement or prosecution. Accordingly, the board may not withhold any of the remaining information under section 552.108(b)(1) of the Government Code.

Section 552.1175 of the Government Code excepts from disclosure 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. Section 552.1175 also encompasses a personal cellular telephone number, unless the cellular telephone service is 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). Section 552.1175 applies, in part, to “criminal investigators of the United States as described by article 2.122(a) Code of Criminal Procedure [.]” Gov't Code § 552.1175(a)(7). Upon review, we find a portion of the remaining information in Exhibit E-1 pertains to an FBI agent that is held by the board in a non-employment capacity. Thus, if the agent at issue is a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure and elects to restrict access to the information in accordance with section 552.1175(b), then the board must withhold the agent's cellular telephone number in Exhibit E-1 under section 552.1175 of the Government Code as long as the cellular telephone service is not paid for by a governmental body.

In summary, the board must withhold the information it marked in Exhibits B-1 and B-2 under section 552.101 of the Government Code in conjunction with article 581-28(A) of the TSA. The board must withhold Exhibit C under section 552.101 of the Government Code in conjunction with the FMLA. The board must withhold Exhibits D-1, D-2, and D-3 under section 552.101 of the Government Code in conjunction with common-law privacy. The board may withhold the information we indicated in Exhibit E-1 under section 552.108(b)(1) of the Government Code. If the FBI agent whose information is at issue in Exhibit E-1 is a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure and elects to restrict access to the information in accordance with section 552.1175(b) of the Government Code, then the board must withhold the FBI agent's cellular telephone number in Exhibit E-1 under section 552.1175

of the Government Code as long as the cellular telephone service is not paid for by a governmental body. The board must release the remaining information.

Finally, you request this office issue a “previous determination” that would permit the board in the future to withhold from disclosure records made by the board in connection with an investigation to prevent or detect a violation of the TSA, board rule, or order without the need of requesting a ruling from us about whether such information can be withheld from disclosure. We decline to issue such a previous determination at this time. Accordingly, 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,

Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/gw

Ref: ID# 833746

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: Third Party  
(w/o enclosures)