



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 17, 2020

Mr. Nick Lealos
Assistant General Counsel
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2020-31717

Dear Mr. Lealos:

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# 860418 (TWC Ref. No. 190722-027).

The Texas Workforce Commission (the "commission") received a request for the entire case file pertaining to three specified investigations involving the requestor. We understand the commission will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You state the commission has released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹ Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

² Although the commission does not raise section 552.130 of the Government Code in its brief, we understand the commission to raise this exception based on its markings.

³ 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.

Initially, we must address the requestor's claim the commission failed to comply with the procedural obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). You state, and provide documentation showing, the commission received the request for information on August 23, 2020. We note August 23, 2020, was a Sunday; thus, the commission is deemed to have received the request for information on August 24, 2020. We note the commission sought clarification of the information requested, and received clarification on September 11, 2020. *See id.* § 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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You state the commission sent a cost estimate to the requestor as permitted by section 552.2615 of the Government Code. *See Gov't Code* § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You state the commission received the required deposit on September 23, 2020. *See id.* (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit). Accordingly, we find September 23, 2020, is the date on which the commission is deemed to have received the request for information. Accordingly, the commission's fifteen-business-day deadline was October 14, 2020. However, you did not submit the information required under section 552.301(e) to this office until October 15, 2020. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Consequently, we find the commission failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). You claim sections 552.101, 552.107, 552.111, and 552.130 of the Government Code for the submitted information. Because sections 552.101, 552.107, and 552.130 can provide compelling reasons to overcome the presumption of openness, we will address your arguments under these sections for the submitted information. However, we find you have failed to establish a compelling reason to address your remaining exception.

Section 3616 of title 42 of the United States Code authorizes the U.S. Department of Housing and Urban Development (“HUD”) to utilize the services of state and local fair housing agencies to assist in meeting its statutory mandate to enforce laws prohibiting discrimination. *See* 42 U.S.C. § 3616. You state, pursuant to this authorization, the commission’s Civil Rights Division (“CRD”) is currently operating under a cooperative agreement with HUD in the investigation and resolution of complaints of housing discrimination. Section 301.063 of the Property Code states the commission shall receive, investigate, seek to conciliate, and act on complaints alleging violations of the Texas Fair Housing Act. *See* Prop. Code § 301.063. Then, upon the filing of a complaint, both federal and state law mirror each other in language and encourage conciliation to the extent feasible. *See* 42 U.S.C. § 3610(b) (providing during the period beginning with the filing of a complaint and ending with the filing of a charge or a dismissal the Secretary of HUD shall, to the extent feasible, engage in conciliation); Prop. Code § 301.085 (providing that the commission shall, during the period beginning with the filing of a complaint and ending with the filing of a charge or a dismissal by the commission, to the extent feasible, engage in conciliation with respect to the complaint).

You state the information you have marked relates to a housing discrimination complaint filed with the commission under its cooperative agreement. You claim the information you have marked is excepted from disclosure under section 552.101 of the Government Code in conjunction with both federal and state law. 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 301.085 of the Property Code, which provides in pertinent part as follows:

(e) Statements made or actions taken in the conciliation may not be made public or used as evidence in a subsequent proceeding under this chapter without the written consent of the persons concerned.

Prop. Code § 301.085(e). Section 301.085(e) prohibits release of statements made or actions taken during conciliation efforts without written consent from all concerned persons. *See id.* § 301.085(e). The commission states the information at issue is excepted from disclosure because the CRD’s efforts at conciliation are confidential under section 552.101 of the Government Code in conjunction with section 301.085(e) of the Property Code. We note section 301.085(e) does not protect “conciliation efforts[;]” it protects “statements made or actions taken in the conciliation[.]” *Id.* Upon review, we find the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 301.085 of the Property Code.

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 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 assert portions of the remaining information, which you have marked, consist of communications between attorneys for the commission and commission employees and officials that were made in furtherance of the rendition of professional legal services to the commission. You state the communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information at issue. Thus, with the exception of the information we have marked for release, the commission may withhold the information you have marked under section 552.107(1) of the Government Code. However, we note the information we have marked for release has been shared with an individual you have not demonstrated is a privileged party. Therefore, we conclude you have failed to establish this information constitutes privileged attorney-client communications for the purpose of section 552.107(1). Thus, the commission may not withhold the information we have marked for release on the basis section 552.107(1) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See Gov’t Code* § 552.130. We note section 552.130 protects personal privacy. Accordingly, the requestor has a right of access to her own motor vehicle record information under section 552.023 of the Government Code and it may not be withheld from her under section 552.130. *See id.* § 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, with the exception of the motor vehicle record information belonging to the requestor, the commission must withhold the motor vehicle record information you have marked under section 552.130 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. 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. 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). 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 an individual's name, address, and telephone number are generally not private information under common-law privacy. See Open Records Decision No. 554 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy). We note the requestor has a right of access to her own confidential information pursuant to section 552.023 of the Government Code. See Gov't Code § 552.023(a); ORD 481 at 4. Accordingly, with the exception of the requestor's date of birth, the commission must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the commission may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

In summary, the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 301.085 of the Property Code. With the exception of the information we have marked for release, the commission may withhold the information you have marked under section 552.107(1) of the Government Code. With the exception of the motor vehicle record information belonging to the requestor, the commission must withhold the motor vehicle record information you have marked under section 552.130 of the Government Code. With the exception of the requestor's date of birth, the commission must withhold all public citizens'

dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The commission must release the remaining information.⁴

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,

Alexandra C. Burks
Assistant Attorney General
Open Records Division

ACB/rm

Ref: ID# 860418

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴ We note the requestor has a right of access to some of the information being released. *See* Gov't Code § 552.023(a); ORD 481 at 4. Thus, if the commission receives another request for the same information from a different requestor, the commission must again seek a decision from this office. We also note the information being released includes social security numbers belonging to individuals other than the requestor. 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 requesting a decision from this office under the Act. Gov't Code § 552.147(b).