



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 6, 2022

Mr. Marc J. Schnall
Counsel for the City of Kirby
Langley & Banack
745 East Mulberry, Suite 700
San Antonio, Texas 78212-3166

OR2022-10046

Dear Mr. Schnall:

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# 940565.

The City of Kirby (the "city"), which you represent, received a request for all records pertaining to a named individual. You state the city will release some of the requested information. We understand the city will redact social security numbers pursuant to section 552.147(b) of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note, and you acknowledge, some of the submitted information is subject to section 1.012 of the Election Code, which provides as follows:

¹ 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. *See* Gov't Code § 552.147(b).

² 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.

(a) Subject to Subsection (b), an election record that is public information shall be made available to the public during the regular business hours of the record's custodian.

...

(c) Except as otherwise provided by this code or [the Act], all election records are public information.

(d) In this code, "election record" includes:

(1) anything distributed or received by government under this code;

...

(3) a certificate, application, notice, report, or other document or paper issued or received by government under this code.

Elec. Code § 1.012(a), (c), (d)(1), (3). An application for a place on an election ballot "is public information immediately on its filing." *Id.* § 141.035. Therefore, under section 1.012(a), the information at issue is public information subject to disclosure, except as provided by the Act. *See id.* § 1.012(a), (c). Accordingly, we will address your arguments against its disclosure.

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 information protected by federal law, such as 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). Release of the submitted I-9 form in this instance would be "for purposes other than enforcement" of the referenced federal statutes. Accordingly, we conclude the submitted I-9 form is confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.³

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code, which makes tax return information confidential. *See* 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 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, . . .

³ As our ruling is dispositive, we need not consider your arguments against disclosure of this information.

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), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993).

Upon review, we find the submitted W-4 form constitutes confidential tax return information under section 6103(a). Accordingly, the city must withhold the submitted W-4 form pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.⁴

Section 552.101 of the Government Code also encompasses information made confidential by the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See Occ. Code §§ 151.001-168.202*. Section 159.002 of the MPA provides, in relevant part:

(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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. 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)*. We have further found when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications. Upon review, we find a portion of the remaining information, which we have marked, constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are

⁴ As our ruling is dispositive, we need not address your arguments against disclosure of this information.

maintained by a physician and information obtained from a patient's medical records. Accordingly, the city must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA.⁵

Section 552.101 of the Government Code also encompasses former section 1701.454 of the Occupations Code, which relates to the availability of public information submitted to the Texas Commission on Law Enforcement ("TCOLE"). We note the remaining information includes an F-5 form that was created prior to the effective date of the amendment of section 1701.454 by the Seventy-ninth Legislature. *See* Act of May 25, 2005, 79th Leg., R.S., ch. 1298, § 4, 2005 Tex. Gen. Laws 4094, 4096. Thus, the F-5 form at issue is governed by the previous version of section 1701.454. *See* Act of May 25, 2005, 79th Leg., R.S., ch. 1298, § 6, 2005 Tex. Gen. Laws 4094, 4096. Former section 1701.454 provides as follows:

(a) A report or statement 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 subsection, a [TCOLE] member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the [TCOLE] employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by [TCOLE] that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code. § 1701.454 (repealed 2005). Upon review, we find the F-5 form created prior to the effective date of the amendment of section 1701.454 is not subject to release under the provisions of former section 1701.454. Therefore, the city must withhold the F-5 form created prior to the effective date of the amendment under section 552.101 of the Government Code in conjunction with former section 1701.454 of the Occupations Code.⁶

Section 552.101 of the Government Code also encompasses section 58.008 of the Family Code, which provides, in part:

⁵ As our ruling is dispositive, we need not consider your argument against disclosure of this information.

⁶ As our ruling is dispositive, we need not address your arguments against disclosure of this information.

(b) Except as provided by Subsection (c), law enforcement records concerning a child and information concerning a child that are stored by electronic means or otherwise and from which a record could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult records;

(2) if maintained electronically in the same computer system as adult records, accessible only under controls that are separate and distinct from the controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subsection (c) or Subchapter B, D, or E.

Fam. Code § 58.008(b); *see id.* § 51.03(a)-(b) (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of title 3 of Family Code). We understand you to raise section 58.008(b) of the Family Code.⁷ Section 58.008(b) is applicable to records of juvenile conduct that occurred before, on, or after September 1, 2017. *See* Act of May 28, 2017, 85th Leg., R.S., ch. 746, § 22, 2017 Tex. Sess. Law Serv. 3173, 3187. The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See* Fam. Code § 51.02(2) (defining “child” for purposes of title 3 of Family Code). Upon review, we find you have not demonstrated the information you marked identifies a juvenile suspect or offender for purposes of section 58.008(b). Accordingly, the city may not withhold the information you marked under section 552.101 of the Government Code in conjunction with section 58.008(b) of the Family Code.

Section 552.101 of the Government Code also encompasses information protected by other statutes. Section 261.201 of the Family Code provides, in part, as follows:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

⁷ Although you raise section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code, we note the 85th Legislature repealed this provision effective September 1, 2017. Act of May 28, 2017, 85th Leg., R.S., ch. 746 § 13, 2017 Tex. Sess. Law Serv. 3173, 3176-77.

Id. § 261.201(a). Upon review, we find you have failed to demonstrate any portion of the information you marked was used or developed in an investigation of alleged or suspected child abuse or neglect under section 261.201(a)(2). Furthermore, you have not established the information at issue is a report of alleged or suspected abuse or neglect made under section 261.201(a)(1). *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261). Therefore, the city may not withhold the information you marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses information protected by chapter 411 of the Government Code, which makes confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See Gov’t Code* § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter E-1 or subchapter F of the Government Code. *See Gov’t Code* § 411.083. 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 obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter E-1 or subchapter F of the Government Code. We note 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 id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Upon review, we find you have not demonstrated the information you marked consists of CHRI for purposes of chapter 411 of the Government Code, and the city may not withhold it under section 552.101 of the Government Code on that basis.

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 highly intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. The court of appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *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.). 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 also found personal financial information not relating to the financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. See Open Records Decision Nos. 600, 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has also held common-law privacy protects the identifying information of juvenile victims of abuse or neglect. See Open Records Decision No. 394 (1983); cf. Fam. Code § 261.201. However, we 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), 423 at 2 (1984).

Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold all public citizens' dates of birth and the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁸ However, we find you have not demonstrated any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, none of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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*

⁸ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 state the information you marked consists of a communication between outside legal counsel for the city and the city manager in his capacity as a client. You inform us this communication was made in furtherance of the rendition of professional legal services to the city. We understand this communication was confidential, and we have no indication the city has waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you marked. Accordingly, the city may withhold the information you marked under section 552.107(1) of the Government Code.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See Gov’t Code* § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Upon review, we find you have failed to demonstrate the information you marked is subject to section 552.108(a)(2), and the city may not withhold it on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a current or honorably retired peace officer, as well as information that reveals whether the current or honorably retired peace officer has family members, regardless of whether the current or honorably retired peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See id.* § 552.117(a)(2); *id.* § 552.003(1-b) (defining “honorably retired” for purposes of the Act). Accordingly, the city must withhold the information we marked under section 552.117(a)(2) of the Government Code.

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.⁹ *Id.* § 552.1175. Section 552.1175, applies, in part, to “current or honorably retired peace officers as defined by Article 2.12, Code of Criminal Procedure[.]” *Id.* § 552.1175(a)(1); *see id.* § 552.003(1-b). Some of the remaining information at issue relates to an honorably retired peace officer of the city’s police department, but the information is not held by the city in an employment capacity. Accordingly, the city must withhold the information we marked under section 552.1175 of the Government Code if the individual at issue elects to restrict access the information at issue in accordance with section 552.1175(b) 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 id.* § 552.130(a). Accordingly, the city must withhold the motor vehicle record information you marked and the additional information we marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the city must withhold the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the submitted I-9 form is confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code. The city must withhold the submitted W-4 form pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA. The city must withhold the F-5 form created prior to the effective date of the amendment under section 552.101 of the Government Code in conjunction with former section 1701.454 of the Occupations Code. The city must withhold all public citizens’ dates of birth and the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold the information you marked under section 552.107(1) of the Government Code. The city must withhold the information we marked under section 552.117(a)(2) of the Government Code. If the individual at issue elects to restrict access to his information at issue in accordance with section 552.1175(b), the city must withhold the information we marked under section 552.1175 of the Government Code. The city must withhold the motor vehicle record information you marked and the additional information we marked under section 552.130 of the Government Code. The city must withhold the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The city must release the remaining information.

⁹ 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.

Finally, you also ask this office to issue a previous determination that would permit the city to withhold dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy without requesting a decision from this office. *See* Open Records Decision No. 673 (2001). 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,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/jm

Ref: ID# 940565

Enc. Submitted documents

c: Requestor
(w/o enclosures)