



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 15, 2022

Mr. Dorwin L. Sargent, III
Counsel for the Town of Hickory Creek
Law Office of Dorwin L. Sargent III, PLLC
624 West University Drive, #127
Denton, Texas 76201

OR2022-35621

Dear Mr. Sargent:

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# 980367 (TOHC File No. 20220825.01).

The Town of Hickory Creek (the "town"), which you represent, received a request for personnel records pertaining to a named officer. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.1175, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the submitted information includes an officer's Texas Commission on Law Enforcement ("TCOLE") identification number. Section 552.002(a) of the Government Code defines "public information" as the following:

¹ We note you did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(e). Nonetheless, as sections 552.101, 552.102, 552.117, 552.1175, and 552.130 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information. *See id.* §§ 552.007, .302, .352. Additionally, we note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

² We assume that 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 that those records contain substantially different types of information than that submitted to this office.

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand the officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in TCOLE's electronic database and may be used as an access device number on the TCOLE website. Thus, we find the officer's TCOLE number does not constitute public information under section 552.002 of the Government Code. Therefore, the officer's TCOLE number is not subject to the Act and need not be released to the requestor.³

Section 552.102(a) of the Government Code excepts 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. 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 exception encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v.*

³ As we are able to make this determination, we need not address your argument against disclosure of this information.

Tex. Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it exempts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. See *id.* at 348. Upon review, we find the town must withhold the date of birth of the employee at issue under section 552.102(a) of the Government Code.⁴ However, none of the remaining information is subject to section 552.102(a), and the town may not withhold any of it on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). This office has previously determined the release of the score report of the Minnesota Multiphasic Personality Inventory (the "MMPI") implicates an individual's constitutional right to privacy. Open Records Decision No. 600 at 6 (1992) (relying on *Whalen v. Roe*, 429 U.S. 589 (1977), and *McKenna v. Fargo*, 451 F.Supp. 1355 (D.N.J. 1978)). We note the MMPI assumes certain components of the personality and scores people as to these traits on a numerical scale to enable comparison with established norms; a report of an individual's MMPI scores therefore purports to reveal highly intimate information about the individual, including negative characteristics. See ORD 600 at 5 (MMPI scores may reveal, inter alia, the applicant's tendency toward hysteria, hypochondria, or mood swings). The submitted information includes an M-Pulse Inventory Report, which reveals highly intimate details of the named individual's personality, including negative characteristics. Upon review, we find the town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy.⁵

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26

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

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of the United States Code renders federal tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as “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[.]” *See* 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). Thus, the submitted W-4 form constitutes tax return information that is confidential under section 6103(a) of title 26 of the United States Code and the town must withhold it under section 552.101 of the Government Code.⁶

Section 552.101 of the Government Code also encompasses information subject to chapter 550 of the Transportation Code. Section 550.065 applies only to a written report of an accident required under section 550.061, 550.062, or 601.004. *See* Transp. Code § 550.065(a)(1). Chapter 550 requires the creation of a written report when the accident resulted in injury to or the death of a person or damage to the property of any person to the apparent extent of \$1,000 or more. *Id.* §§ 550.061 (operator’s accident report), .062 (officer’s accident report). An accident report is privileged and for the confidential use of the Texas Department of Transportation or a local governmental agency of Texas that has use for the information for accident prevention purposes. *Id.* § 550.065(b). Accordingly, the town must withhold CR-3 accident report we have marked under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.⁷

Section 552.101 of the Government Code also encompasses information other statutes make confidential. The remaining information includes an L-3 Declaration of Psychological and Emotional Health form required by TCOLE.⁸ This form is confidential under section 1701.306 of the Occupations Code, which is encompassed by section 552.101 of the Government Code. Section 1701.306 provides the following:

(a) The commission may not issue a license to a person unless the person is examined by:

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

⁷ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

⁸ The Texas Commission on Law Enforcement Officer Standards and Education was renamed TCOLE by the 83rd Legislature. *See* Act of May 6, 2013, 83rd Leg., R.S., ch. 93, § 1.01.

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a blood test or other medical test.

(b) An agency hiring a person for whom a license is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a)-(b). Therefore, the town must withhold the submitted L-3 declaration form under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.⁹

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to 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 Chapter 552, Government Code, 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. The remaining information includes information that was submitted to TCOLE pursuant to subchapter J of chapter 1701 of the Occupations Code. Furthermore, the information at issue does not indicate the named officer resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the town 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.¹⁰

⁹ As our ruling is dispositive, we need not address your argument against disclosure of this information.

¹⁰ As our ruling is dispositive, we need not address your arguments against disclosure of this information.

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 id.* § 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 F, or subchapter E-1 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 obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, 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). Further, CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we find a portion of the remaining information consists of CHRI that is confidential under section 411.083. Thus, the town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.¹¹

As previously noted, section 552.101 of the Government Code encompasses common-law privacy, which is subject to the two-part test discussed above. *Indus. Found.*, 540 S.W.2d at 685. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, protected under common-law privacy), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. ORD 545. We note the payroll deductions for federal withholding tax are protected by common-law privacy and must be withheld under section 552.101, but the payroll deductions for social security, mandatory retirement, and Medicare

¹¹ As our ruling is dispositive, we need not address your argument against disclosure of this information.

are not protected by common-law privacy and may not be withheld under section 552.101. *See, e.g.*, ORDs 600 at 9-12 (participation in TexFlex), 545 at 3-5; *see also* Attorney General Opinion GA-0572 at 4 (2007) (public employee's net salary protected by common-law privacy, but gross salary is not). We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 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); 432 at 2 (1984) (scope of public employee privacy is narrow). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). 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.). Upon review, we find some of the information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the town must withhold all public citizens' dates of birth and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.¹² However, we find you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the town may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

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* Gov't Code § 552.117(a)(2); *see also id.* § 552.003(1-b) (defining "honorably retired" for purposes of the Act). We note, for purposes of section 552.117, "family member" means a spouse, minor child, or adult child who resides in the person's home. *See id.* § 552.117(c). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We also 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). We further note section 552.117(a)(2) is not applicable to a former spouse and does not protect the fact that a peace officer has been divorced. Accordingly, the town must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not

¹² As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

pay for the cellular telephone service.¹³ Upon review, however, we find you have failed to demonstrate any of the remaining information is subject to section 552.117(a)(2), and the town may not withhold any of it on that basis.

Section 552.1175 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. *See Gov't Code* § 552.1175. We note, for purposes of section 552.1175, “family member” means a spouse, minor child, or adult child who resides in the person’s home. *Cf. id.* § 552.117(c). Section 552.1175 applies, in part, to “current or honorably retired peace officers as defined by Article 2.12, Code of Criminal Procedure[.]” *See id.* § 552.1175(a)(1); *see also id.* 552.003(1-b). Accordingly, to the extent the information we have marked relates to an individual subject to section 552.1175 who elects to restrict access to their information in accordance with section 552.1175(b), the town must withhold the information we have marked under section 552.1175 of the Government Code.¹⁴

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. Accordingly, the town must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. However, no portion of the remaining information constitutes motor vehicle record information subject to section 552.130. Thus, the town may not withhold any of the remaining information on this basis.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”¹⁵ *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Open Records Decision No. 684 at 9 (2009). Accordingly, the town must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

We note the remaining information contains e-mail addresses that are subject to section 552.137 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

¹³ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

¹⁴ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

¹⁵ 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).

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* Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the town must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

Section 552.139 of the Government Code provides, in pertinent part, “a photocopy or other copy of an identification badge issued to an official or employee of a governmental body” is confidential. *Id.* § 552.139(b)(3). Therefore, the town must withhold the copies of the identification cards we have marked under section 552.139 of the Government Code.

In summary, the officer’s TCOLE number is not subject to the Act and need not be released to the requestor. The town must withhold the date of birth of the employee at issue under section 552.102(a) of the Government Code. The town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with constitutional privacy. The town must withhold the submitted W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The town must withhold CR-3 accident report we have marked under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code. The town must withhold the submitted L-3 declaration form under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The town 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 town must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The town must withhold all public citizens’ dates of birth and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The town must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. To the extent the information we have marked relates to an individual subject to section 552.1175 who elects to restrict access to their information in accordance with section 552.1175(b), the town must withhold the information we have marked under section 552.1175 of the Government Code. The town must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The town must withhold the insurance policy number we have marked under section 552.136 of the Government Code. The town must withhold the personal e-mail addresses in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The town must withhold the copies of the identification cards we have marked under section 552.139 of the Government Code. The town must release the remaining information.

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,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/pt

Ref: ID# 980367

Enc. Submitted documents

c: Requestor
(w/o enclosures)