

## PRIVACY AND PERSONNEL RECORDS

The following is a list of mandatory exceptions that make certain information confidential by law. These exceptions include privacy doctrines and statutes applicable to information held by the average governmental body.

First, we discuss some of the most common exceptions that make information confidential by law. We begin with common statutes found outside of the Act, then move on to common-law privacy and common exceptions found within the Act.

### **SECTION 552.101 GOV'T CODE + STATUTES OUTSIDE THE ACT**

#### **SECTION 552.101**

##### **INFORMATION PROTECTED:**

- ▶ Information that is made confidential by **law outside of the Act**, including constitutional, statutory, and judicial decisions.
  - ✓ NOTE: Section 552.101 must be raised in conjunction with another law, including common-law privacy.
  - ✓ NOTE 2: Section 552.101 should not be raised in conjunction with one of the numbered exceptions to disclosure in the Act.

### **SECTION 1324a OF TITLE 8 OF THE UNITED STATES CODE**

##### **INFORMATION PROTECTED:**

- ▶ Employment Eligibility Verification “Form I-9” and appended ID forms.
  - ✓ NOTE: If the Form I-9 contains attachments such as a driver’s license or social security card, then those attachments are also withheld.
  - ✓ NOTE 2: Pursuant to Open Records Decision No. 684 (2009), governmental bodies are authorized to withhold a Form I-9 and its attachments without requesting a decision from the OAG.

### **SECTION 6103(a) OF TITLE 26 OF THE UNITED STATES CODE**

**INFORMATION PROTECTED:**

- ▶ Tax return information.
  - ✓ NOTE: Tax return information includes W-2 and W-4 forms.
  - ✓ NOTE 2: Pursuant to Open Records Decision No. 684, governmental bodies are authorized to withhold W-2 and W-4 forms without the necessity of requesting a decision from this office.

**SECTION 560.003 OF THE GOVERNMENT CODE**

**INFORMATION PROTECTED:**

- ▶ Biometric identifiers.
  - ✓ NOTE: Biometric identifier means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
  - ✓ NOTE 2: Pursuant to section 560.002, an individual has a right of access to his or her own biometric identifier.
  - ✓ NOTE 3: A biometric identifier of a deceased individual may not be withheld.
  - ✓ NOTE 4: Pursuant to Open Records Decision No. 684, governmental bodies are authorized to withhold fingerprints without the necessity of requesting a decision from this office.

**SECTION 1701.306 OF THE OCCUPATIONS CODE**

**INFORMATION PROTECTED:**

- ▶ L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms.
  - ✓ NOTE: Pursuant to Open Records Decision No. 684, governmental bodies are authorized to withhold L-2 and L-3 declarations without the necessity of requesting a decision from this office.

**SECTION 1701.454 OF THE OCCUPATIONS CODE**

**INFORMATION PROTECTED:**

- ▶ All information submitted to Texas Commission on Law Enforcement under subchapter J of chapter 1701 of the Occupations Code
  - ✓ NOTE: An F-5 Separation of Licensee form must be withheld.
  - ✓ NOTE 2: Section 1701.454 does not apply when the officer resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

**SECTION 1703.306 OF THE OCCUPATIONS CODE**

**INFORMATION PROTECTED:**

- ▶ Information acquired from a polygraph examination.

**AMERICANS WITH DISABILITIES ACT OF 1990 (“ADA”)**

**INFORMATION PROTECTED:**

- ▶ Certain medical records pertaining to an employee’s disability (The ADA provides that this confidential information must be (1) collected and maintained on separate forms, (2) kept in separate medical files and (3) treated as a confidential medical record.)
- ▶ The EEOC has determined that information subject to the ADA includes: (1) information about the medical conditions and medical histories of applicants or employees; (2) information obtained in the course of a “fitness for duty examination” conducted to determine whether an employee is still able to perform the essential functions of his or her job; (3) specific information about an individual’s disability and related functional limitations; as well as (4) general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.

**WHAT YOU NEED TO TELL US:**

- Because not all medical information pertaining to an employee is subject to the ADA, you must tell us whether the records at issue are being held by your agency for purposes of and in accordance with the ADA.

**SECTION 143.089 OF THE LOCAL GOVERNMENT CODE**

- ▶ Provides for the maintenance of two different personnel files relating to police officers, fire fighters, and emergency medical services personnel by municipalities that elect to become civil service cities under chapter 143 of the Local Government Code.

- ✓ NOTE: The two personnel files are:

- (1) Civil service personnel file maintained pursuant to section 143.089(a), and

- (2) Internal file that the police department or fire department maintains for its own use pursuant to section 143.089(g).

- ✓ NOTE 2: Section 143.089 is only applicable to municipalities that elect to become civil service cities.

### **SECTION 143.089(a) OF THE LOCAL GOVERNMENT CODE**

- ▶ Requires the civil service commission to maintain a civil service file.

- ✓ NOTE: The civil service file must contain:

- Commendations or honors bestowed on the police officer, fire fighter or emergency medical services personnel.
  - All information, including background documents such as complaints, witness statements, and documents of like nature, relating to any misconduct that resulted in disciplinary action taken against the police officer, fire fighter, or emergency medical services personnel.
  - Periodic evaluations.

- ✓ NOTE 2: Disciplinary action includes:

- Removal.
  - Suspension.
  - Demotion.
  - Uncompensated duty.

- ✓ NOTE 3: Disciplinary action does not include a written reprimand.

- ✓ NOTE 4: The civil service file is not confidential under section 143.089 and is subject to release.

- A governmental body may raise other exceptions to disclosure for the civil service file.
- ✓ NOTE 5: The civil service commission, not the police department or fire department, maintains the civil service file.
- ✓ NOTE 6: Pursuant to section 143.089(e), a police officer, fire fighter, or emergency medical services personnel has a right of access to his or her civil service file.

### **SECTION 143.089(g) OF THE LOCAL GOVERNMENT CODE**

- ▶ Allows for the maintenance of an internal file by a police department or fire department for the department's own use.
  - ✓ NOTE: A department's internal file on a police officer, fire fighter, or emergency medical services personnel is confidential.
  - ✓ NOTE 2: A department that receives a request for the personnel file of a police officer, fire fighter, or emergency medical services personnel must refer the requestor to the civil service commission.
  - ✓ NOTE 3: An investigation of misconduct that did not result in disciplinary action must be placed in the individual's internal file.
  - ✓ NOTE 4: A police officer, fire fighter, or emergency medical services personnel does not have a right of access to his or her internal file maintained by the department.
  - ✓ NOTE 5: A police department or fire department may not engraft the confidentiality provided by section 143.089(g) to information the department also maintains separate from the internal file when such information is specifically requested.
    - For example, if an individual seeks information relating to a specified incident, and the department has information relating to the incident in both an internal file of a police officer and also as part of separate law enforcement records regarding the incident, then the department may not withhold the information that is also maintained as law enforcement records under section 143.089(g).

### **WHAT YOU NEED TO TELL US WHEN ASSERTING SECTION 143.089:**

- Whether your city has elected to become a civil service city.
- Whether the information at issue is maintained within the civil service file or the internal file.
- If the information relates to misconduct by a police officer or a fire fighter, whether the investigation resulted in disciplinary action.

## **SECTION 552.101 GOV'T CODE + COMMON-LAW PRIVACY**

### **COMMON-LAW PRIVACY**

#### **INFORMATION PROTECTED:**

- ▶ Information that (1) contains highly intimate or embarrassing facts, which if publicized would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public.
  - ✓ NOTE: Information must meet both prongs of this test to be withheld.
  - ✓ NOTE 2: Information contained in personnel records subject to common-law privacy includes:
    - Dates of Birth.
    - Personal financial information.
    - Medical information.
    - Information relating to a sexual harassment investigation.
  - ✓ NOTE 3: Pursuant to section 552.023, an individual or the individual's authorized representative has a right of access to records that implicate the individual's privacy interests.
  - ✓ NOTE 4: An individual's right to privacy lapses at death.
  - ✓ NOTE 5: A public employee's privacy is narrow as the public generally has a legitimate interest in information that relates to public employment and public employees (job qualifications, performance of public employees, reasons for dismissal, demotion, promotion, or resignation of public employees).

### **DATES OF BIRTH**

## **INFORMATION PROTECTED:**

- ▶ The Third Court of Appeals in *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.) determined dates of birth of public citizens are protected by common-law privacy.
  - ✓ NOTE: Dates of birth belonging to individuals who are not identified or who have been de-identified are not protected by common-law privacy. The privacy interest of those individuals are protected because they are not identified.

## **PERSONAL FINANCIAL INFORMATION**

### **INFORMATION PROTECTED:**

- ▶ Personal financial information not relating to a financial transaction between an individual and a governmental body.
  - ✓ NOTE: Examples:
    - Assets or debts.
    - Optional insurance coverage.
    - Direct deposit authorization.
    - Lien information.
    - Net salary.
    - Designation of beneficiaries for retirement benefits.
  - ✓ NOTE 2: There is a legitimate public interest in the essential facts about a financial transaction with a governmental body.
  - ✓ NOTE 3: Information relating to an employee's participation in a group insurance fund funded in part or full by a governmental body and gross salary information are not withheld under common-law privacy.
    - A governmental body needs to tell the OAG what insurance coverages are optional or not funded by the governmental body.
  - ✓ NOTE 4: Pursuant to Open Records Decision No. 684, governmental bodies are authorized to withhold direct deposit authorization forms without requesting a decision from this office.

## **MEDICAL INFORMATION**

### **INFORMATION PROTECTED:**

- ▶ Information relating to specific illnesses or disabilities.

✓ NOTE: Examples:

- Illnesses.
- Operations.
- Physical handicaps.
- Psychiatric treatment of mental disorders.
- Specific prescription medications, not the fact an individual is taking medication.
- Pregnancy.
- Blood type.

### **SEXUAL HARASSMENT INVESTIGATION INFORMATION**

#### **INFORMATION PROTECTED:**

- ▶ If the investigation contains an adequate summary, then withhold (1) all investigation information except the statement of the accused and the adequate summary and (2) the identities of the victims and witnesses of sexual harassment within the adequate summary and statement of the accused.
- ▶ If the information does not contain an adequate summary, the identities of the victims and witnesses of sexual harassment must be withheld throughout the sexual harassment investigation.
- ✓ NOTE: An adequate summary includes the allegations as well as the results of the investigation.
- ✓ NOTE 2: In either case, the identity of the person accused of sexual harassment and his/her statement are not protected.
- ✓ NOTE 3: This analysis only applies to sexual harassment in the employment context.

### **EXCEPTIONS IN THE ACT**

#### **SECTION 552.102(a)**

#### **INFORMATION PROTECTED:**

- ▶ The date of birth of an employee of a governmental body in a record maintained by his or

her employer in an employment context.

- ✓ NOTE: The Texas Supreme Court ruled section 552.102(a) applies to dates of birth of governmental employees in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010).
- ✓ NOTE 2: Under *Texas Comptroller*, section 552.102(a) excepts from disclosure the birth date of an employee of a governmental body in a record maintained by his or her employer in an employment context. For dates of birth not held in an employment context, see common-law privacy discussion above.

### **SECTION 552.117(a)(1)**

#### **INFORMATION PROTECTED:**

- ▶ The home address, home telephone number, emergency contact information, and social security number of a **current or former official or employee of a governmental body** and information that reveals whether the official or employee has family members if the official or employee elects confidentiality under section 552.024.

NOTE: Section 552.117 only applies to records held by you in an **employment capacity**.

- ✓ NOTE 2: The official or employee **must elect confidentiality** under section 552.024 in writing **prior to** the date a request for information is received.
- ✓ NOTE 3: Section 552.024(c)(2) permits a governmental body to redact information subject to section 552.117(a)(1) without requesting a ruling from the OAG.
  - If a governmental body redacts information pursuant to section 552.024(c)(2) without requesting a ruling from the OAG, the governmental body must provide the requestor with the form prescribed by the OAG.
  - A copy of the form can be found on the OAG's website, [www.texasattorneygeneral.gov/open/ord\\_forms.shtml](http://www.texasattorneygeneral.gov/open/ord_forms.shtml).

### **SECTION 552.117(a)(2)**

#### **INFORMATION PROTECTED:**

- ▶ The home address, home telephone number, emergency contact information, and social security number of a **peace officer** and information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175.
  - ✓ NOTE: Peace officer is defined by article 2.12 of the Code of Criminal Procedure.
  - ✓ NOTE 2: No election of confidentiality is needed to withhold information under section 552.117(a)(2).
  - ✓ NOTE 3: Pursuant to Open Records Decision No. 670 (2001), governmental bodies are authorized to withhold the current and former home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers without requesting a decision from the OAG.

#### **WHAT YOU NEED TO REMEMBER ABOUT SECTION 552.117:**

- Section 552.117 only applies to records held by a governmental body in an employment context.
- ✓ NOTE: Section 552.117 does not apply to information a governmental body holds that pertains to an employee of another governmental body.
- Section 552.117 does not protect information belonging to applicants, volunteers, or contractors.
- Post office boxes are not “home addresses” for purposes of section 552.117.
- Section 552.117 is applicable to pager numbers and cellular telephone numbers, if the service is not paid for by a governmental body.
- Pursuant to section 552.023, an official or employee or that individual’s authorized representative has a right of access to his or her own section 552.117 information.

#### **WHAT YOU NEED TO TELL US WHEN ASSERTING SECTION 552.117:**

- If you are asserting section 552.117(a)(1), whether the employee or official at issue **elected confidentiality** pursuant to section 552.024 **prior**

to the date you received the request for information.

- If you are asserting section 552.117(a)(2), whether the individual at issue is **currently a peace officer** as defined by article 2.12 of the Code of Criminal Procedure.

## **SECTION 552.1175**

### **INFORMATION PROTECTED:**

- ▶ The home address, home telephone number, emergency contact information, social security number, and date of birth of certain enumerated individuals, and information that reveals whether those individuals have family members.

✓ NOTE: The enumerated individuals include:

- Peace officers as defined by article 2.12 of the Code of Criminal Procedure.
- County jailers as defined by section 1701.001 of the Occupations Code.
- Current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department.
- Commissioned security officers as defined by section 1702.002 of the Occupations Code.
- Employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters.
- Officers and employees of a community supervision and corrections department established under chapter 76 who perform a duty described by section 76.004(b) of the Government Code.
- Criminal investigators of the United States as described by article 2.122(a) of the Code of Criminal Procedure.
- Police officers and inspectors of the United States Federal Protective Service.
- Current and former employees of the OAG who are or were assigned to a division where the duties involve law enforcement.

✓ NOTE 2: Section 552.1175 applies to information regarding:

- (1) individuals **who work for you, but the information is held in a non-employment capacity.**

Example: An officer who is employed with your

governmental body’s police department is named as a witness in an offense report. His personal information found in the offense report can be protected by this exception if proper election is made.

OR

- (2) individuals **who never worked for you, but are employed by another governmental body.**

Example: You have the home address and home phone number of a police officer who works for a **different governmental body** and provided a reference for one of your employees. Her personal information can be protected by this exception **if the police officer makes an election with your agency.**

- ✓ NOTE 3: Section 552.1175 protection is not automatic. An individual whose information is protected under section 552.1175 must elect to withhold his or her information pursuant to section 552.1175(b) with the governmental body that receives the request for information.
- ✓ NOTE 4: Section 552.1175 does not require the individual to elect confidentiality for his or her information prior to a governmental body’s receipt of a request for information.
- ✓ NOTE 5: Section 552.1175(f) permits a governmental body to redact information subject to section 552.1175(b) without requesting a ruling from the OAG.
  - If a governmental body redacts information pursuant to section 552.1175(f) without requesting a ruling from the OAG, the governmental body must provide the requestor with the form prescribed by the OAG.
  - A copy of the form can be found on the OAG’s website, [www.texasattorneygeneral.gov/open/ord\\_forms.shtml](http://www.texasattorneygeneral.gov/open/ord_forms.shtml).

<b>WHAT YOU NEED TO TELL US...</b>	<b>552.117(a)(1)</b>	<b>552.117(a)(2)</b>	<b>552.1175</b>
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To whom does the information belong and how is it held?	Information pertaining to current and former employees of <b>your governmental body</b> , held by you in an <b>employment capacity</b> .	Information pertaining to peace officers employed by <b>your governmental body</b> , held by you in an <b>employment capacity</b> .	Information pertaining to peace officers and certain other law enforcement personnel either (1) <b>employed by you</b> , but the information is held in a <b>non-employment capacity</b> , or (2) employed by <b>another</b> governmental body.
Has the individual elected confidentiality?	Employee elected confidentiality <b>before</b> you received the request.	Protection is automatic.	Individual makes an <b>election</b> with your governmental body (can be <b>after</b> you received the request).

**SECTION 552.130**

**INFORMATION PROTECTED:**

- ▶ A motor vehicle operator’s or driver’s license, permit, title, or registration issued by Texas or another state or country or a personal identification document issued by Texas or another state or country or a local agency authorized to issue an identification document.
  - ✓ NOTE: Examples:
    - Driver’s license number, class, expiration date.
    - License plate number and age.
    - Vehicle identification number.
  - ✓ NOTE 2: Pursuant to section 552.023, an individual or that individual’s authorized representative has a right of access to his or her own motor vehicle record information.
  - ✓ NOTE 3: Motor vehicle record information pertaining to only a deceased individual may not be withheld under section 552.130.
  - ✓ NOTE 4: Section 552.130(c) permits a governmental body to redact information subject to subsection 552.130(a) without requesting a ruling from the OAG.

- If a governmental body redacts information pursuant to section 552.130(c) without requesting a ruling from the OAG, the governmental body must provide the requestor with the form prescribed by the OAG.
- A copy of the form can be found on the OAG's website, [www.texasattorneygeneral.gov/open/ord\\_forms.shtml](http://www.texasattorneygeneral.gov/open/ord_forms.shtml).

## **SECTION 552.136**

### **INFORMATION PROTECTED:**

- ▶ Credit card, debit card, charge card, or access device numbers.
  - ✓ NOTE: Access device number means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to: (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.
  - ✓ NOTE 2: Pursuant to section 552.023, an individual or that individual's authorized representative has a right of access to his or her credit card, debit card, charge card, or access device numbers.
  - ✓ NOTE 3: Credit card, debit card, charge card, or access device numbers pertaining to only a deceased individual may not be withheld under section 552.136.
  - ✓ NOTE 4: Section 552.136(c) permits a governmental body to redact a credit card, debit card, charge card, or access device number without requesting a ruling from the OAG.
    - If a governmental body redacts information pursuant to section 552.136(c) without requesting a ruling from the OAG, the governmental body must provide the requestor with the form prescribed by the OAG.
    - A copy of the form can be found on the OAG's website, [www.texasattorneygeneral.gov/open/ord\\_forms.shtml](http://www.texasattorneygeneral.gov/open/ord_forms.shtml).

## WHAT YOU NEED TO TELL US WHEN ASSERTING SECTION 552.136:

- Explain how the number at issue can be used to obtain money, goods, services, or another thing of value.

## SECTION 552.137

### INFORMATION PROTECTED:

- ▶ E-mail addresses of members of the public that are provided to communicate electronically with a governmental body.
  - ✓ NOTE: Section 552.137 does not apply to a governmental employee's work e-mail address or a business's general e-mail address or website.
  - ✓ NOTE 2: Pursuant to section 552.137(c), the following e-mail addresses may not be withheld:
    - E-mail addresses of an individual who has a contractual relationship with a governmental body.
    - E-mail addresses provided to a governmental body by an entity seeking a contract with the governmental body.
    - E-mail addresses contained in a request for bids or proposals.
    - E-mail addresses provided on a letterhead, coversheet, or document made available to the public.
    - E-mail addresses provided for public comment on or receiving notices related to an application for a license, or receiving orders or decisions.
  - ✓ NOTE 3: This section **does not apply** to the private e-mail addresses of government officials who use their private e-mail addresses to conduct official government business. *See Austin Bulldog v. Leffingwell*, No. 03-13-00604-CV (Tex. App.—Austin April 8, 2016) (mem. op.).
  - ✓ NOTE 4: Pursuant to section 552.137(b), an individual or that individual's authorized representative has a right of access to his or her own e-mail address.
  - ✓ NOTE 5: Pursuant to Open Records Decision No. 684, governmental bodies are authorized to withhold an e-mail address of a member of the public without the necessity of requesting a decision from this office.

## **SECTION 552.140**

### **INFORMATION PROTECTED:**

- ▶ A military veteran's Department of Defense Form DD-214 or other military discharge record that first comes into a governmental body's possession **on or after September 1, 2003**.
  - ✓ NOTE: A DD-214 form or other military discharge record that comes into a governmental body's possession prior to September 1, 2003, may not be withheld under section 552.140.
  - ✓ NOTE 2: Pursuant to section 552.140(c), an individual or the individual's authorized representative has a right of access to his or her own DD-214 form or other military discharge record.
  - ✓ NOTE 3: Pursuant to Open Records Decision No. 684, governmental bodies are authorized to withhold a DD-214 form that is first recorded or first comes into the possession of a governmental body on or after September 1, 2003, without the necessity of requesting a decision from this office.

### **WHAT YOU NEED TO TELL US WHEN ASSERTING SECTION 552.140:**

- When the DD-214 form or other military discharge record first came into your possession.

## **SECTION 552.152 OF THE GOVERNMENT CODE**

### **INFORMATION PROTECTED:**

- ▶ Information in the custody of a governmental body that relates to an employee or officer of the governmental body if, **under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.**