



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 16, 2013

Mr. Brandon S. Davis  
For the City of Dayton  
Fielder & Gunter  
1517 Trinity Street  
Liberty, Texas 77575

OR2013-00967

Dear Mr. Davis:

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# 476219.

The City of Dayton (the "city"), which you represent, received a request for the complete civil service personnel file of a named officer. You state some information will be released to the requestor. You state the city will redact information as permitted by sections 552.1175, 552.136(c), and 552.147(b) of the Government Code.<sup>1</sup> You claim that a portion of the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

---

<sup>1</sup>Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure who properly elects to keep this information confidential. *See* Gov't Code § 552.1175(b), (f). Section 552.136 of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, access device numbers subject to section 552.136(b). *See id.* § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to 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 the necessity of requesting an attorney general decision under the Act. *See id.* § 552.147(b).

<sup>2</sup>Although you also raise section 552.108 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

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 information other statutes make confidential. Federal tax return information is confidential under section 6103 of title 26 of the United States Code. For purposes of section 6103, “return information” includes “the nature, source, or amount of income” of a taxpayer. *See* 26 U.S.C. § 6103(b)(2); *see also* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Upon review, we agree the city must withhold the W-2 and W-4 forms in Exhibit F under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

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 the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”) under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) All information submitted to [TCLEOSE] 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 subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. Upon review, we find the city must withhold the F-5 form we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.<sup>3</sup>

Section 552.101 of the Government Code also encompasses the doctrine of 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. 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 met. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See 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 excepted from required public disclosure under common-law privacy. *See*

---

<sup>3</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office also has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 (1982) (references in emergency medical records to drug overdoses, acute alcohol intoxication, obstetrical or gynecological operations or illnesses, convulsions or seizures, and emotional or mental distress). However, we note the public generally has a legitimate interest in public employment and public employees, particularly those who are involved in law enforcement. *See* Open Records Decision No. 444 at 6 (1986) (public has genuine interest in information concerning law enforcement employee's qualifications and performance and circumstances of his termination or resignation); *see also* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (job performance does not generally constitute public employee's private affairs). Upon review, we agree a portion of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find the remaining information is not highly intimate or embarrassing and of no legitimate public concern, and the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.103 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990)*. We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See Open Records Decision No. 588 at 7 (1991)*. We further note a contested case before the State Office of Administrative Hearings (the "SOAH") is considered litigation for the purposes of the APA. *See id.*

You inform us the city's police department is a party to a contested administrative hearing before the SOAH, Docket No. 407-13-0194.F5, that was pending when the city received the request for information. Based on your representations and our review, we determine litigation was pending on the date the city received the request for information. Furthermore, you state, and we agree, that the information in Exhibit D relates to the pending litigation. Accordingly, we find the city may withhold the information at issue under section 552.103 of the Government Code.

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *Open Records Decision Nos. 349 (1982), 320 (1982)*. Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded. *Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2*.

We note the remaining information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.<sup>4</sup> Section 552.102(a) 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). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The city must withhold the information we have marked in the remaining information under section 552.102(a) of the Government Code.

---

<sup>4</sup>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)*.

You state the city will redact the information you have marked under section 552.117 of the Government Code pursuant to section 552.024 of the Government Code.<sup>5</sup> We note that the remaining documents contain additional information that is subject to section 552.117. Section 552.117(a)(1) of the Government Code exempts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individuals whose information we have marked, in addition to the information you have marked, timely requested confidentiality under section 552.024 and the cellular telephone service is not paid for by a governmental body, the city must withhold the marked information under section 552.117(a)(1) of the Government Code. If the individuals whose information is at issue did not make timely elections under section 552.024 or if the cellular telephone service is paid for by a governmental body, the city may not withhold the information we have marked under section 552.117(a)(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 issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. You state the city will redact certain motor vehicle record information under section 552.130(c) of the Government Code.<sup>6</sup> Upon review, we find the submitted information contains additional motor vehicle record information. Accordingly, the city must withhold the motor vehicle record information you have marked, and the additional information we have marked, under section 552.130 of the Government Code.

---

<sup>5</sup>Section 552.024(c) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code §§ 552.024(c)(2), .117(a).

<sup>6</sup>Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

The remaining information also includes military discharge records that are subject to section 552.140 of the Government Code, which provides, in part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

*Id.* § 552.140(a). Section 552.140 provides a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003, is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a)-(b). We note the submitted DD-214 forms came into the city's possession on or after September 1, 2003. Thus, the city must withhold the submitted military discharge records, which we have marked, under section 552.140 of the Government Code.<sup>7</sup>

In summary, the city must withhold under section 552.101 of the Government Code (1) the W-2 and W-4 forms in Exhibit F under section 6103 of title 26 of the United States Code; (2) the F-5 form we marked under section 1701.454 of the Occupations Code; and (3) the information we marked under common-law privacy. The city may withhold Exhibit D under section 552.103 of the Government Code. The city must withhold the dates of birth we have marked under section 552.102 of the Government Code. If the individuals whose information is marked timely requested confidentiality under section 552.024 and the cellular telephone service is not paid for by a governmental body, the city must withhold the information we have marked, in addition to the information you have marked, under section 552.117(a)(1) of the Government Code. The city must withhold the information marked under section 552.130 of the Government Code. The city must withhold the DD-214 form under section 552.140 of the Government Code. The remaining information must be released.<sup>8</sup>

---

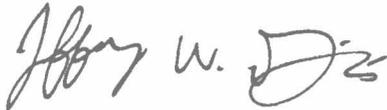
<sup>7</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including: direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy; W-2 and W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; and a Form DD-214 or other military discharge record that is first recorded or first comes into the possession of a governmental body on or after September 1, 2003 under section 552.140(b) of the Government Code.

<sup>8</sup>We note the information being released contains the requestor's e-mail address, to which he has a right of access pursuant to section 552.137(b) of the Government Code. *See Gov't Code* § 552.137(b). Should the city receive another request for this information from a different requestor, we note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of 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. *See ORD* 684.

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 [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Jeffrey W. Giles". The signature is written in a cursive style with a large initial "J" and "G".

Jeffrey W. Giles  
Assistant Attorney General  
Open Records Division

JWG/dls

Ref: ID# 476219

Enc. Submitted documents

c: Requestor  
(w/o enclosures)