



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 22, 2015

Ms. Lindsey Wolf  
General Counsel  
Office of the Secretary of State  
P.O. Box 12697  
Austin, Texas 78711-2697

OR2015-27003

Dear Ms. Wolf:

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# 589921.

The Office of the Secretary of State (the "secretary's office") received a request for eleven categories of information pertaining to voter registration. You state you do not have information responsive to portions of the request.<sup>1</sup> You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.108, 552.110, 552.111, 552.1175, 552.130, 552.136, 552.137, and 552.147 of the Government Code and privileged under Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

Procedure.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-16527 (2015). In Open Records Letter No. 2015-16527, we concluded the secretary's office may withhold the submitted information under section 552.103 of the Government Code. There is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the secretary's office may continue to rely on Open Records Letter No. 2015-16527 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

Next, you state the secretary's office has released some of the submitted information in response to previous requests under the Act. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov't Code 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Although you raise section 552.103 of the Government Code for this information, this section is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not expressly prohibit the release of the information at issue or make the information confidential. Therefore, to the extent the secretary's office previously released any of the information at issue to a member of the public, the secretary's office may not now withhold any such information under section 552.103. To the extent the secretary's office did not previously release the submitted information to a member of the public, we will address your arguments against disclosure.

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<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002). Further, although you raise section 552.117 of the Government Code, we note section 552.1175 of the Government Code is the proper exception to raise for information not held by the secretary's office in an employment context.

<sup>3</sup>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.

Next, we must address the secretary's office's procedural obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). The secretary's office received the request for information on September 17, 2015. Thus, the secretary's office's ten-business-day deadline was October 1, 2015. Although you raised sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.130, 552.136, and 552.147 and Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure within the ten-business-day time period as required by section 552.301(b), you did not raise section 552.104 or section 552.110 of the Government Code until after the ten-business-day period had passed. Thus, the secretary's office failed to comply with section 552.301 of the Government Code with respect to its claims under sections 552.104 and 552.110 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). We note section 552.104 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5, 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Therefore, in failing to timely raise section 552.104 of the Government Code, the secretary's office has waived its argument under this section and may not withhold any of the submitted information on that basis. However, because section 552.110 of the Government Code can provide a compelling reason to withhold information, we will consider whether the submitted information may be withheld on that basis. Further, we will address the secretary's office's timely-raised claims under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.130, 552.136, and 552.147 of the Government Code.

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). The governmental body has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. The test for meeting this burden is showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* Open Records Decision No. 551 at 4 (1990).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state, and provide supporting documentation showing, prior to the receipt of the instant request, the secretary's office received an attorney letter alleging violations of the National Voter Registration Act (the “NVRA”) and corresponding state law. The letter goes on to state “counsel are willing to meet with the [secretary's office] to assist in your development of a comprehensive plan for full compliance.” The letter states that if the secretary's office does not remedy the alleged violations, “[counsel] are prepared to pursue litigation as permitted by [the NVRA].” You state the secretary's office formally requested representation from the Office of the Attorney General (the “OAG”) as a result of the letter. Thus, you assert on the date the secretary's office received the request for information, the secretary's office reasonably anticipated litigation to which the secretary's office would be a party. Based on your representations and our review, we find the secretary's office reasonably anticipated litigation on the date the request was received. You also represent, and we agree, portions of the submitted information are related to the anticipated litigation

for purposes of section 552.103. Accordingly, the secretary's office may withhold the information you marked under section 552.103 of the Government Code.<sup>4</sup>

We note once the information has been obtained by all parties to the anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 31.006 of the Election Code. Section 31.006 of the Election Code provides the following:

(a) If, after receiving a complaint alleging criminal conduct in connection with an election, the [secretary's office] determines that there is reasonable cause to suspect that the alleged criminal conduct occurred, the secretary shall promptly refer the complaint to the [OAG]. The secretary shall deliver to the [OAG] all pertinent documents in the secretary's possession.

(b) The documents submitted under Subsection (a) are not considered public information until:

(1) the [secretary's office] makes a determination that the complaint received does not warrant an investigation; or

(2) if referred to the [OAG], the [OAG] has completed the investigation or has made a determination that the complaint referred does not warrant an investigation.

Elec. Code § 31.006. We understand the information you marked was delivered to the OAG pursuant to section 31.006(a). You inform us this information is either still under investigation with the OAG or is still being reviewed by the secretary's office. Based on your representations and our review, we agree the information at issue is not considered public information under section 31.006(b). Accordingly, the secretary's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code.<sup>5</sup>

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.101 of the Government Code also encompasses the NVRA, section 20507 of title 52 of the United States Code. Section 20507 identifies requirements with respect to the administration of voter registration. *See* 52 U.S.C. § 20507. This section provides each state, in the administration of voter registration for elections for federal office, shall “ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.” *See id.* § 20507(a)(6). We note the information you marked does not reveal the identity of the voter registration agency through which a voter is registered. We find you have failed to demonstrate the information at issue is subject to section 20507(a)(6) of title 52 of the United States Code. Accordingly, the secretary’s office may not withhold the information at issue under section 552.101 of the Government Code on that basis.

The secretary’s office asserts the dates of birth in the remaining information are excepted from public disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. In considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the supreme court’s rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *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.). The supreme court concluded public employees’ dates of birth are private under section 552.102 of the Government Code because the employees’ privacy interest substantially outweighed the negligible public interest in disclosure.<sup>6</sup> *Tex. Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens’ dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at \*3. Thus, the secretary’s office must withhold all public citizens’ dates of birth in the remaining information under section 552.101 of the Government Code. However, we find the remaining information is not highly intimate or embarrassing information or is of legitimate public interest. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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. Gov’t Code § 552.1175(b). Section 552.1175 applies, in part, to “peace officers as defined by Article 2.12, Code of Criminal Procedure[.]” *Id.* § 552.1175(a)(1).

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<sup>6</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).

Some of the remaining information pertains to individuals who may be subject to section 552.1175. Thus, to the extent the information you marked pertains to individuals subject to section 552.1175(a), and the individuals elect to restrict access to this information in accordance with section 552.1175(b), the secretary's office must withhold the information you marked under section 552.1175 of the Government Code. If the individuals whose information you marked are not subject to section 552.1175(a) or no election is made, the secretary's office may not withhold this information under section 552.1175 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 secretary's office must withhold the motor vehicle record information you 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). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find the secretary's office must withhold the personal e-mail address you marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the secretary's office may continue to rely on Open Records Letter No. 2015-16527 as a previous determination and withhold the identical information in accordance with that ruling. The secretary's office may withhold the information you marked under section 552.103 of the Government Code. The secretary's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code. The secretary's office must withhold all public citizens' dates of birth in the remaining information under section 552.101 of the Government Code. To the extent the information you marked pertains to individuals subject to section 552.1175(a), and the individuals elect to restrict access to this information in accordance with section 552.1175(b), the secretary's office must withhold the information you marked under section 552.1175 of the Government Code. The secretary's office must withhold the motor vehicle record information you marked under section 552.130 of the Government Code. The secretary's office must withhold the personal e-mail address you marked under section 552.137 of the Government Code, unless the owner

affirmatively consents to its public disclosure. The secretary's office 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 [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kenny Moreland', written over a horizontal line.

Kenny Moreland  
Assistant Attorney General  
Open Records Division

KJM/som

Ref: ID# 589921

Enc. Submitted documents

c: Requestor  
(w/o enclosures)