



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 28, 2012

Ms. Cheryl Elliott Thornton
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2012-04553

Dear Ms. Thornton:

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# 449107 (Harris County Attorney File Nos. 12PIA0013 and 12PIA0072).

The Harris County Constable (the "constable") received two requests for the complete personnel file of a specified constable employee. You claim the submitted information is excepted from disclosure under sections 552.102, 552.108, 552.111, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the constable's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. *See* Gov't Code § 552.301. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See id.* § 552.301(b). While you raised sections 552.102, 552.111, 552.117, and 552.1175 within the ten-business-day time period in regards to the first request as required by subsection 552.301(b), you did not raise section 552.108 within that time. Thus, in regards to the request for information the constable received on January 5, 2012, the constable failed to comply with the requirements mandated by subsection 552.301(b) as to its argument under section 552.108 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 of the Government Code results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *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 (Tex. App.—Austin 1990, no writ); *see also* 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. Open Records Decision No. 150 at 2 (1977). Section 552.108 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interest and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, in failing to comply with section 552.301, the constable has waived its argument under section 552.108 and may not withhold the submitted information in response to the first request on that basis. We note in waiving its section 552.108 claim for the information responsive to the first request, the constable also waived its section 552.108 claim for this same information with respect to the second request. However, we will consider your timely raised arguments against disclosure under sections 552.102, 552.111, 552.117, and 552.1175 of the Government Code.

Next, we note the submitted information contains a completed investigation and completed reports subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). As noted above, you have waived your argument under section 552.108. Thus, the constable may withhold the submitted information only to the extent it is made confidential under the Act or other law. You raise sections 552.102, 552.111, 552.117, and 552.1175 of the Government Code. However, section 552.111 is a discretionary exception and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Accordingly, the constable may not withhold any of the information subject to section 552.022(a)(1) on the basis of that section. However, because sections 552.102, 552.117, and 552.1175 of the Government Code make information confidential for purposes of 552.022(a)(1), we will address the applicability of these sections to the information subject to section 552.022(a)(1) as well as the remaining information. We will also consider the applicability of section 552.111 to the information not subject to section 552.022(a)(1).

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation

with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *see also* Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, opinions, recommendations and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *See id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

You assert the submitted information not subject to section 552.022 should be protected under section 552.111. However, we note the information at issue pertains to personnel matters concerning only the individual at issue. You have not demonstrated how this information involves policymaking pertaining to personnel matters of a broad scope. Therefore, the constable may not withhold any of the information at issue under section 552.111 of the Government Code.

Section 552.102 of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwanted 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. *See Indus. Found. v. 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 Third 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 expressly disagreed with *Hubert’s* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts*, 354 S.W.3d at 342. The supreme court then considered the applicability of section 552.102, and 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. *See id.* at 346. Accordingly, the

constable must withhold the birth dates we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 of the Government Code or section 552.1175 of the Government Code.¹ Gov't Code § 552.117(a)(2). Accordingly, the constable must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Section 552.1175 of the Government Code provides, in part, the following:

Information that relates to the home address, home telephone number, emergency contact information, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(b). The remaining responsive information contains information pertaining to peace officers not employed by the constable. Upon review, we find the constable must withhold the information we have marked under section 552.1175 if the individuals to whom this information concerns elect to restrict access to their information in accordance with section 552.1175(b).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”² Gov't Code § 552.101. This section encompasses information protected by other statutes, including section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and “any information contained in or

¹“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

²The 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).

appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the submitted I-9 form in this instance would be “for purposes other than enforcement” of the referenced federal statutes. Accordingly, we conclude the submitted I-9 form, which we have marked, is confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code, which renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns). 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 Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Chamberlain v. Kurtz*, 589 F.2d 827, 840-41 (5th Cir. 1979); *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Consequently, the constable must withhold the W-4 form we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 of the Government Code also encompasses information protected by the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which provides in relevant part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Medical records may be released only as provided under the MPA. ORD 598. Upon review, we find the medical records we have marked may only be released in accordance with the MPA.

Section 552.101 of the Government Code also encompasses section 258.102 of the Occupations Code, which provides in pertinent part:

(a) The following information is privileged and may not be disclosed except as provided by this subchapter:

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

Occ. Code § 258.102(a). A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. The constable must withhold the dental records we have marked under section 258.102 of the Occupations Code unless the constable receives the required consent for release of those records under section 258.104 of the Occupations Code.

Next, we note the remaining submitted information contains L-2 Declaration of Medical Condition forms required by the Texas Commission on Law Enforcement Standards and

Education (“TCLEOSE”), which are subject to section 1701.306 of the Occupations Code. Section 1701.306 is also encompassed by section 552.101 of the Government Code and provides the following:

(a) [TCLEOSE] may not issue a license to a person unless the person is examined by:

(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 [TCLEOSE]. A declaration is not public information.

Id. § 1701.306(a), (b). Therefore, the constable must withhold the submitted L-2 declaration forms, which we have marked, under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the National Crime Information Center network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990); *see generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Thus, any CHRI obtained from

DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we find the information we have marked constitutes confidential CHRI, which the constable must withhold under section 552.101 in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 also encompasses section 411.192 of the Government Code, which governs the release of information maintained by DPS concerning the licensure of an individual to carry a concealed handgun. Section 411.192 provides in part:

(a) [DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, zip code, telephone number, e-mail address, and Internet website address. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552.

(b) An applicant or license holder may be furnished a copy of disclosable records regarding the applicant or license holder on request and the payment of a reasonable fee.

Id. § 411.192(a)-(b). We have marked information related to a concealed handgun license. The constable appears to have obtained that information from DPS. In this instance, neither requestor is a criminal justice agency, nor are the requestors the license holders whose information is at issue. Further, we note section 411.193 is not applicable in this instance. *See id.* § 411.193 (making statistical report including number of licenses issued, denied, revoked, or suspended during the preceding month available to the public). Therefore, the constable must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 411.192 of the Government Code.

Section 552.101 also encompasses section 560.003 of the Government Code. Section 560.003 provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“‘Biometric identifier’ means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry”). However, section 560.002 of the Government Code provides that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). We have marked a fingerprint in the submitted information. You do not inform us, and the submitted information does not indicate, section 560.002 permits disclosure of the submitted fingerprint information.

Therefore, the constable must withhold the fingerprint we have marked under section 552.101 of the Government Code in accordance with section 560.003 of the Government Code.

Next, we note some of the remaining information is subject to common-law privacy, which is also encompassed by section 552.101 of the Government Code. The doctrine of common-law privacy 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.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. The type of information considered highly intimate or 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. *Id.* at 683. This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Furthermore, 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 (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the constable must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

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 a personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. Upon review, we find the constable must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states “[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.” *Id.* § 552.136(b). This office has determined an insurance policy number is an access device for purposes of section 552.136. Therefore, the constable must withhold the insurance policy numbers, which we have marked, under section 552.136 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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to the work e-mail address of an employee of a governmental body because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. The constable must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

Section 552.140 of the Government Code 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 be disclosed only in accordance with section 552.140 or a court order. *See id.* § 552.140(a)-(b). We note that section 552.140 applies to only the DD-214 form itself or other military discharge records and not references to the form or records. Based on the submitted information, we understand the constable came into possession of the submitted military discharge records after September 1, 2003. Accordingly, we conclude the constable must withhold the military discharge records, which we have marked, under section 552.140 of the Government Code.

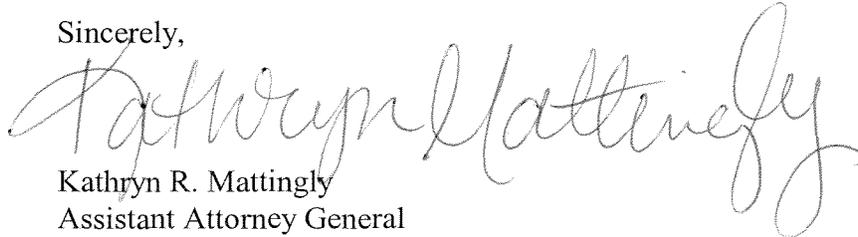
In summary, the constable must withhold the following: (1) the I-9 form we have marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code, (2) the W-4 form we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, (3) the marked L-2 declaration forms under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code, (4) the confidential CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code, (5) the concealed handgun license information we have marked under section 552.101 of the Government Code in conjunction with section 411.192 of the Government Code, (6) the fingerprint we have marked under section 552.101 of the Government Code in accordance with section 560.003 of the Government Code, (7) the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy (8) the birth dates we have marked under section 552.102 of the Government Code, (9) the information we have marked under section 552.117(a)(2) of the Government Code, (10) the information we have marked under section 552.1175 if the individuals to whom this information concerns elect to restrict access to their information in accordance with section 552.1175(b), (11) the motor vehicle record information we have marked under section 552.130 of the Government Code, (12) the insurance policy numbers we have marked under section 552.136 of the Government Code, (13) the e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure, and (14) the military discharge records we have marked under section 552.140 of the Government Code. The

medical records we have marked may only be released in accordance with the MPA. The dental records we have marked may only be released in accordance with section 258.104 of the Occupations Code. The remaining information must be released.³

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, 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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 449107

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

³We note Open Records Decision No. 684 (2009) 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: L-2 declarations under section 552.101 of the Government Code in conjunction with section 1701.306(b) of the Occupations Code; a Form I-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; a 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; a direct deposit authorization form under section 552.101 of the Government Code in conjunction with common-law privacy; a Texas license plate number under section 552.130 of the Government Code; an e-mail address of a member of the public under section 552.137 of the Government Code; and a DD-214 form under section 552.140 of the Government Code, without the necessity of requesting an attorney general decision.