



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 31, 2014

Ms. Heather Silver
Assistant City Attorney
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2014-13280

Dear Ms. Silver:

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# 533714 (ORR# 202781).

The City of Dallas (the "city") received a request for information pertaining to a named employee and a specified drug test. You state the city has released some of the requested information. You claim some of the remaining requested information is excepted from disclosure under sections 552.101, 552.117, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you assert the date of birth at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy on the basis of the decision in *City of Dallas v. Abbott*, No. D-1-GV-12-000861 (53rd Dist. Ct., Travis County, Tex., July 11, 2013). 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. However, upon review, we find the court's

¹We 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 that those records contain substantially different types of information than that submitted to this office.

decision is limited to the facts and information at issue in the underlying letter rulings, and does not apply to the information currently at issue. Accordingly, the city may not withhold the date of birth in the information at issue based on the court's decision in that case.

We understand you to contend the date of birth at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 521.051 of the Business and Commerce Code. Section 521.051(a) of the Business and Commerce Code provides:

A person may not obtain, possess, transfer, or use personal identifying information of another person without the other person's consent and with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name.

Bus. & Comm. Code § 521.051(a). "Personal identifying information" means "information that alone or in conjunction with other information identifies an individual" and includes an individual's date of birth. *Id.* § 521.002(a)(1)(A). You assert the marked date of birth meets the definition of "personal identifying information" under section 521.002(a)(1) of the Business and Commerce Code. *See id.* § 521.002(a)(1). We note section 521.051(a) of the Business and Commerce Code does not prohibit the transfer of personal identifying information of another person unless the transfer is made with the intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name without that person's consent. *See id.* § 521.051(a). In this instance, the city's release of the information at issue would be for the purpose of complying with the Act, and not "with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value[.]" *See id.* Therefore, section 521.051(a) of the Business and Commerce Code does not prohibit the city from transferring the requested information. Accordingly, the city may not withhold the marked date of birth under section 552.101 in conjunction with section 521.051 of the Business and Commerce Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"). Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides:

- (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.

Id. § 159.002. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. The information we have marked consists of medical records subject to the MPA. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). We understand you to assert the submitted information is confidential under common-law privacy on the basis of Open Records Decision No. 594 (1991), in which this office concluded public employees may have a privacy interest in their drug test results. *See* ORD 594 (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (1987) (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d. 1136 (3rd Cir. 1986)). We note the submitted information pertains to the results of drug tests administered to city employees. As this office has explained on many occasions, information involving public officials and employees and public employment is generally not private because the public has a legitimate interest in such information. *See* 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), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 5 (1986) (public has legitimate interest in knowing reasons for public employee's dismissal, demotion, or promotion), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city has failed to demonstrate, however, how the remaining information is highly intimate or embarrassing and

not of legitimate public interest. Therefore, the city may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117, .024. 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 official or 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 employee whose information is at issue made a timely election under section 552.024, the city must withhold the information you have marked under section 552.117(a)(1) of the Government Code. If the employee did not make a timely election under section 552.024, the city may not withhold the information you have marked under section 552.117(a)(1) of the Government Code.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). An access device number is one that 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 a paper instrument, and includes an account number. *Id.* § 552.136(a) (defining "access device"). The city informs us an employee's identification number is used in conjunction with one additional digit in order to access the employee's credit union account. Upon review, we find the city must withhold the employee identification numbers it marked under section 552.136 of the Government Code.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA and common-law privacy. If the employee whose information is at issue made a timely election under section 552.024, the city must withhold the information you have marked under section 552.117(a)(1) of the Government Code. The city must withhold the information you have marked under section 552.136 of the Government Code. The city must release the submitted 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, 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 "Jennifer Luttrall". The signature is written in a cursive, flowing style.

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 533714

Enc. Submitted documents

c: Requestor
(w/o enclosures)

OCT 21 2015

At 3:00 P M.
Velva L. Price, District Clerk

Cause No. D-1-GV-12-001471

CITY OF DALLAS,
Plaintiff,

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IN THE DISTRICT COURT OF

v.

GREG ABBOTT,
ATTORNEY GENERAL OF TEXAS,
Defendant.

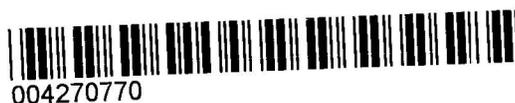
TRAVIS COUNTY, TEXAS

53rd JUDICIAL DISTRICT

FINAL JUDGMENT

On October 20, 2015, the above-styled and numbered cause came on for trial. Plaintiff, the City of Dallas, and Defendant, Ken Paxton, Attorney General of Texas, appeared by counsel of record and announced ready. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which the City of Dallas (the "City"), sought to withhold certain information from public disclosure. The parties submitted all matters in controversy, legal and factual, to the Court. The Court renders judgment for the City of Dallas.

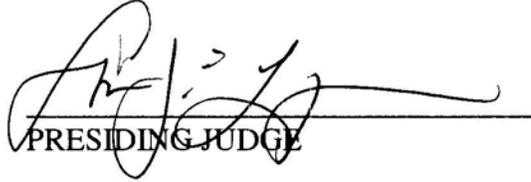
In accordance with *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061 (Tex. App.—Austin May 22, 2015, pet. denied), it is ADJUDGED, ORDERED, and DECREED that the dates of birth of members of the public that are subject to the following attorney general rulings are excepted from disclosure under PIA section 552.101 as information coming within the common-law right of privacy: OR2012-15687, OR2013-13460, OR2013-14173, OR2013-15029, OR2014-02027, OR2014-03053, OR2014-10958, OR2014-12007, OR2014-13280, OR2015-00856, OR2015-03225, OR2015-04746, OR2015-06486, OR2015-09796, OR2015-09650, OR2015-12740, OR2015-12882, OR2015-11167, OR2015-12505, OR2015-14442, OR2015-12568, OR2015-15076, OR2015-14991, OR2015-15428, OR2015-15574, OR2015-16409, OR2015-16823, OR2015-17001, OR2015-16711, OR2015-17686, OR2015-17639, and OR2015-18652.



All relief not expressly granted is denied.

This judgment disposes of all claims between all parties and is a final judgment.

SIGNED on the 20th day of OCTOBER, 2015.


PRESIDING JUDGE

APPROVED AS TO FORM:


JAMES B. PINSON

State Bar No. 16017700
Assistant City Attorney
Dallas City Attorney's Office
1500 Marilla Street, Room 7BN
Dallas, Texas
Telephone: (214) 670-3519
Facsimile: (214) 670-0622
james.pinson@dallascityhall.com

ATTORNEY FOR PLAINTIFF,
THE CITY OF DALLAS


KIMBERLY FUCHS

State Bar No. 24044140
Chief, Open Records Litigation
Administrative Law Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4195
Facsimile: (512) 320-0167
kimberly.fuchs@texasattorneygeneral.gov

ATTORNEY FOR DEFENDANT,
KEN PAXTON, ATTORNEY GENERAL
OF TEXAS