



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 23, 2016

Mr. Vance Hinds
Assistant County and District Attorney
Ellis County
109 South Jackson
Waxahachie, Texas 75165

OR2016-21572

Dear Mr. Hinds:

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# 628725.

The Ellis County and District Attorney's Office (the "district attorney's office") received a request for specified correspondence with the County and District Attorney, as well as information pertaining to appointments or meetings that include named individuals, since January of 2011.¹ The district attorney's office claims some of the submitted information is either not subject to the Act or excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, 552.130, 552.136, 552.137, 552.147, and 552.152 of the Government Code.² The district attorney's office also informs us, and provides documentation showing, it notified Krueger International, Inc. ("KI") and a named

¹The district attorney's office sought and received clarification of the information requested. *See Gov't Code* § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²We note the district attorney's office also marked some information under section 552.110 of the Government Code, but made no arguments under this exception. *See Gov't Code* §§ 552.301, .302. We further note section 552.110 protects only the interests of the third parties that have provided information to a governmental body, not those of the governmental body itself. *See id.* § 552.110 (excepts from disclosure trade secrets or commercial or financial information obtained from person). Thus, we do not address the applicability of section 552.110.

individual of the receipt by the district attorney's office of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released), .305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). In correspondence to this office, KI asserts some of its information is excepted from disclosure under section 552.104 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the district attorney's office has redacted information from the submitted documents. The district attorney's office does not assert, nor does our review of our records indicate, it has been authorized to withhold any such information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of it does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested"), .302.

The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) reads as follows:

(a) In this chapter, "public information" means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The district attorney's office informs us some of the submitted information pertains to the "election process" of an Ellis County judge. The district attorney's office asserts this information is not subject to the Act because "[a]n individual's interest in his or her own eligibility to hold office is exclusive to the individual" and "[a] governmental body does not have a legitimate public interest in any particular person holding office." However, based upon the representations of the district attorney's office and our review, we find the district attorney's office maintains all of the submitted information in connection with the transaction of its official business. Thus, the information constitutes "public information" as defined by section 552.002(a). Accordingly, the submitted information is subject to the Act in its entirety and the district attorney's office must release it, unless it falls within an exception to public disclosure under the Act. See Gov't Code §§ 552.006, .021-.301, .302. Therefore, we will address the arguments against the release of the submitted information under the Act.

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. Section 552.101 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). 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. *Indus. Found.*, 540 S.W.2d 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.³ *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. Therefore, the district attorney's office must withhold the dates of birth of public citizens in the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy. We also find some of the remaining information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we conclude the remaining information is not confidential under common-law privacy, and the district attorney's office may not withhold it under section 552.101 on that ground.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* KI states it has competitors and argues release of the information it has indicated would cause it substantial competitive harm. Upon review, we find KI has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district attorney's office may withhold this information, which we have marked, under section 552.104(a) of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer

³Section 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).

representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The district attorney’s office asserts the information it has marked under section 552.107(1) consists of confidential communications between attorneys and representatives of the district attorney’s office that were made for the purpose of rendering professional legal advice. It also asserts the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the district attorney’s office has demonstrated the applicability of the attorney-client privilege to this information. Therefore, the district attorney’s office may withhold the information it has marked under section 552.107(1) of the Government Code.⁴

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers 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 be withheld under section 552.117(a)(1) only 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, the district attorney’s office must withhold the information we have marked under section 552.117(a)(1) if the employees at issue made timely elections to keep the information confidential; however, the district

⁴As our ruling is dispositive, we do not address the other arguments of the district attorney’s office to withhold this information.

attorney's office may only withhold the cellular telephone numbers at issue under section 552.117(a)(1) if the cellular telephone service was not provided to the employees at issue at public expense. Nevertheless, section 552.117 is not applicable to any of the remaining information, and the district attorney's office may not withhold it on that ground.

Section 552.1175 of the Government Code may be applicable to some of the remaining information.⁵ Section 552.1175 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. *See* Gov't Code § 552.1175. We note section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure" and "state judges as defined by Section 13.0021, Election Code[.]" *Id.* § 552.1175(a)(1), (13). Some of the remaining information pertains to individuals who may be subject to section 552.1175. Thus, the district attorney's office must withhold the information we have marked under section 552.1175 if it pertains to individuals who are subject to section 552.1175(a) and they elect to restrict access to their information in accordance with section 552.1175(b); however, the district attorney's office may only withhold the cellular telephone numbers we marked if the cellular telephone service was not provided to the individuals at issue at public expense. If the individuals are not subject to section 552.1175(a) or they do not elect to restrict access to this information in accordance with section 552.1175(b), then the district attorney's office may not withhold this information under section 552.1175. In addition, the district attorney's office may not withhold the cellular telephone numbers marked under section 552.1175 if the cellular telephone service was provided to the individuals at issue at public expense.

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* Gov't Code § 552.130. We agree the district attorney's office must withhold the motor vehicle record information it has marked under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of this chapter, 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). This office has determined an insurance policy number is an access device number for purposes of section 552.136. Open Records Decision No. 684 at 9 (2009).

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

Thus, the district attorney's office must withhold the information it has 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 member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address 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 e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). The district attorney's office does not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the district attorney's office must withhold the e-mail addresses of members of the public in the remaining information under section 552.137 of the Government Code.

Section 552.147(a) of the Government Code provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147(a). The district attorney's office may withhold the social security number it has marked under section 552.147.

Section 552.152 of the Government Code provides the following:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 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.

Id. § 552.152. The district attorney's office has provided no arguments demonstrating release of any of the remaining information would subject an employee or officer of the district attorney's office to a substantial threat of physical harm. Therefore, we conclude the district attorney's office may not withhold any of the remaining information under section 552.152.

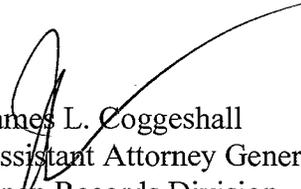
To conclude, the district attorney's office may withhold the information we have marked under section 552.104(a) of the Government Code and the information it has marked under sections 552.107(1) and 552.147 of the Government Code. The district attorney's office must withhold the following: (1) the dates of birth of public citizens and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the information we have marked under section 552.117(a)(1) of the Government Code if the employees at issue made timely elections to keep the information confidential; however, the district attorney's office may only withhold the cellular telephone numbers at issue under section 552.117(a)(1) if the cellular telephone service was not provided to the employees at issue at public expense; (3) the information we

have marked under section 552.1175 of the Government Code if it pertains to individuals who are subject to section 552.1175(a) and they elect to restrict access to their information in accordance with section 552.1175(b); however, the district attorney's office may only withhold the cellular telephone numbers we marked if the cellular telephone service was not provided to the individuals at issue at public expense; (4) the information it has marked under sections 552.130 and 552.136 of the Government Code; and (5) the e-mail addresses of members of the public in the remaining information under section 552.137 of the Government Code. The district attorney'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, 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bw

Ref: ID# 628725

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)