



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1994

Mr. Dan Pleitz
City Attorney
City of Robinson
Naman, Howell, Smith & Lee
P.O. Box 1470
Waco, Texas 76703-1470

OR94-204

Dear Mr. Pleitz:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former article 6252-17a, V.T.C.S.).¹ Your request was assigned ID# 17495.

The City of Robinson (the "city"), which you represent, has received a request for certain tax information. Specifically, the requestor seeks four categories of information:

1. Signed Tax Rollback Petition presented to Robinson City Council [September 25, 1992].
2. Certification of number of registered voters in the City of Robinson according to the latest McLennan County Poll List.
3. The first and second quarter of 1992 Form 941 Employer's Quarterly Federal Tax Return for the City of Robinson.
4. The first and second quarter of 1992 Form C-3 Texas Employment Commission Employer's Quarterly Reports and attachments for the City of Robinson.

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

You advise us that items 1 and 2 have been made available to the requestor. You claim, however, that items 3 and 4 are excepted from required public disclosure by section 552.101 of the Government Code.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that some of the requested information is made confidential by section 202.091 of the Labor Code (formerly article 5221b-9(g), V.T.C.S). That provision authorizes the Texas Employment Commission ("TEC") to collect information from employers and ensures the confidentiality of information so obtained in TEC's possession. Open Records Decision No. 599 (1992). Section 202.091 of the Labor Code provides in pertinent part:

(b) The Commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of this subtitle.

(c) Employment information thus obtained or otherwise secured may not be published and is not open to public inspection other than to a public employee in the performance of public duties, except as the Commission considers necessary for the proper administration of this subtitle.

(d) A person commits an offense if the person is an employee or member of the commission who violates any provision of this section. . . .

As subsection (d) indicates, this provision applies only to information obtained by and in the possession of the TEC. *See* Open Records Decision No. 520 (1989) (holding that a Tax Code confidentiality provision applies only to information in the possession of the comptroller and does not apply to the same information in the hands of the taxpayer that submitted the information to the comptroller, in part due to similar penalty provision); *see also* Open Records Decision No. 226 (1979) (holding that the name, address, social security number and wages of a government employee are public information). We have examined the documents submitted to us for review and conclude that the requested TEC Employer's Quarterly Reports and attachments (Form C-3) are merely copies of reports submitted to the TEC that are in the possession of the city. Therefore, section 202.091 of the Labor Code does not prevent the city from releasing the reports.

You also contend that the common-law privacy aspect of section 552.101 prohibits disclosure of the employee information contained in the TEC report. However, as noted above, prior opinions of this office have concluded that an employee's name, address, and wages received are not protected by privacy. Open Records Decision Nos.

600 (1992); 226 (1979). In addition, common-law privacy does not prevent disclosure of a social security number.² Open Records Decision No. 622 (1994) (copy enclosed).

You claim that section 552.101 of the Government Code in conjunction with federal law prohibits disclosure of the city's Form 941 Employer's Quarterly Federal Tax Return. We disagree. Prior decisions of this office have held that title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (W-4 forms); 226 (W-2 forms). However, these provisions apply to information gathered by the Internal Revenue Service regarding a *taxpayer's* liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989), *vacated in part on other grounds*, 993 F.2d 1111 (1993); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). A taxpayer is defined as "any person subject to any internal revenue tax." 26 U.S.C. § 7701(a)(14). The city is not a taxpayer, it is an employer reporting to the Internal Revenue Service the amounts of income tax withheld from employee taxpayer wages in a given quarter as required by federal law. *See id.* § 3402(a) ("every employer making payment of wages shall deduct and withhold upon such wages a tax"). Moreover, Form 941 does not contain "return information," which is defined 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, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by The Secretary with respect to a return or with respect to the determination of the existence, or possible existence of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

²We note, however, that federal law may prohibit disclosure of the social security numbers found on the TEC Form C-3 reports. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. *See* Open Records Decision No. 622 (1994); *see also* 42 U.S.C. § 405(c)(2)(C)(v) (governing release of social security number collected in connection with the administration of any general public assistance, driver's license or motor vehicle registration law). Based on the information you have provided, we are unable to determine whether the social security number at issue is confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any social security number information, the city should ensure that the information is not confidential under this federal statute.

Id. § 6103(b)(2)(A). Clearly, the requested copies of the Forms 941 submitted to the IRS by the city do not contain return information. The records merely indicate the total wages paid by the city to its employees and reflect the total income tax withheld for a given quarter. Therefore, section 552.101 does not prohibit disclosure of the requested information; and, except as noted above with regard to social security numbers, the city must provide the information to the requestor.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/rho

Ref: ID# 17495

Enclosures: Open Records Decision No. 622
Submitted documents

cc: Mr. Penn Wheelis
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