



September 29, 1999

Ms. Katherine Mintor Cary
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR99-2754

Dear Ms. Cary:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 127762.

The Executive Administration of the Office of the Attorney General (the "OAG") received a request for documents in the personnel file of a former employee. You indicate that the OAG will provide some of the personnel documents to the requestor. You contend that the remaining documents are excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The submitted documents include I-9 forms and W-4 forms which are confidential under federal statutes. The disclosure of I-9 forms is governed by title 8, section 1324a of the United States Code, which provides that the 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. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Thus, I-9 forms are excepted from disclosure under section 552.101 as information made confidential by law and may be released only in compliance with the federal laws and regulations governing the employment verification system.

Similarly, 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 (1992) (W-4 forms), 226 (1979) (W-2 forms). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). Thus, the OAG must withhold the W-4 forms from disclosure under section 552.101 as information deemed confidential by federal statute.

Section 552.101 also encompasses the common-law right to privacy. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. We have marked the information that is protected by the common-law right to privacy (see red tabs). The OAG must withhold the marked information from disclosure under section 552.101. See Open Records Decision No. 600 (1992) (common-law privacy right applied to public employee's personal financial information).

Some of the information at issue is protected from disclosure pursuant to the provisions of Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). We have marked the information that is confidential under the ADA (see markings in orange).¹

Finally, section 552.117 may also be applicable to some of the information at issue. Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, 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. Whether a particular piece of

¹We note that some of the information protected by the ADA is also protected by the Medical Practice Act, article 4495b of Vernon's Texas Civil Statutes, which deems medical records confidential, and the common-law right to privacy.

information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the OAG may only withhold information under section 552.117 if the former employee made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the former employee made a timely election under section 552.024, the OAG must withhold from disclosure her home address, home telephone number, social security number, and information that reveals whether she has family members.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 127762

Encl. Marked documents

cc: Ms. Tiffany Hall
Division Admin. Manager
Texas Department of Transportation
P.O. Box 2293
Austin, Texas 78768
(w/o enclosures)

²The former employee's social security numbers may also be exempted from required public disclosure under section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make a social security number confidential 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).