



September 26, 2000

Mr. Ron Clark
Wolfe, Clark, Henderson & Tidwell, L.L.P.
Attorneys & Counselors
123 North Crockett Street, Suite 100
Sherman, Texas 75090

OR2000-3705

Dear Mr. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139370.

The City of Bonham (the "city"), which you represent, received a request for information, as follows:

1. All payroll records indicating payment of salary to Jim Stiff from the time he was hired until now, including W-2 forms.
2. All records relating to any benefit, thing of value, services of the [city], or remuneration received by Jim Stiff, excepting salary, from the time of his hire until now.
3. All records relating to the [city] paying for, funding, refunding, staffing, allowing use of any city employees (whether on duty or not), or otherwise assisting in or compensating Jim Stiff for his moving expenses to his personal residence.
4. All records relating to road-work performed by the [city] on streets bordering or providing access to Jim Stiff's personal residence, and specifically showing the date when it was planned, approved, ordered to be done, and accomplished, and any cost estimates thereof.
5. All records relating to approval by the City Commission of the road-work specified in [item] 4 above.

6. Copies of all memos from Jim Stiff to any member of the Commission, or for internal use regarding items 1-5 above.
7. Time and calendar records reflecting events in items 1-6 above.
8. Computer records including disks, for items 6 and 7 above.

You have submitted for our review a representative sample of the information that is responsive to the request.¹ You assert that the requested information is excepted from disclosure in its entirety under section 552.103 of the Government Code, and that some of the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. The requestor and the attorney for Mr. Jim Stiff have each also submitted comments to this office. See Gov't Code § 552.304. We have considered the asserted exceptions, the submitted comments, and we have reviewed the submitted information.

Section 552.103, the "litigation exception," excepts from disclosure information:

[R]elating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The city has the burden of providing relevant facts and documents to show that the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request was received by the governmental body, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103.

¹In reaching our conclusion here, we assume that 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 information submitted to this office.

As to the first prong of the above-stated test, you have submitted to this office petitions for two cases that were filed by the requestor on the date of the request, and in which the city is a named defendant. You have thus shown that litigation was pending on the date that the city received the request. As to the second prong of the above-stated test, from our review of the submitted materials we conclude that the requested information relates to the pending litigation, except for one document which we have marked with a yellow flag. This document, an employer's quarterly report of total wages paid to all city employees and the amount of payroll tax paid by the city to the former Texas Employment Commission (now Texas Workforce Commission), does not appear to contain information related to any of the issues in the pending litigation, nor have you explained how this information relates to the litigation. Thus, with the exception of the type of document we have marked with a yellow flag, you have demonstrated the applicability of section 552.103 to the information responsive to the request. Except as otherwise noted herein, the city may thus withhold the requested information pursuant to section 552.103.

Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, if the opposing parties in the pending litigation have seen or had access to any of the information at issue, there would be no justification for now withholding that information pursuant to section 552.103. We assume that the opposing parties to the pending litigation have not previously had access to the records at issue, and that section 552.103 therefore applies. We also note that the applicability of section 552.103 ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Some of the information at issue may be confidential by law. The Public Information Act provides for criminal penalties for the improper release of confidential information. *See Gov't Code* § 552.352. Therefore, if the city receives a request in the future for information that this decision finds is excepted under section 552.103, and if the request is received at a time when section 552.103 no longer applies, the city should again seek a ruling from this office before releasing the requested information.

In pertinent part, section 552.022 of the Government Code provides that unless "expressly confidential under other law" the following categories of information are public information and are not excepted from required public disclosure:

- (2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;
- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

(4) the name of each official and the final record or voting on all proceedings in a governmental body;

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(2), (3), (4), (5). We have marked with green flags the documents in the submitted sample that consist of or contain information that falls within one or more of the above-stated categories. Because section 552.103 is a discretionary exception under the Public Information Act and does not constitute other law that makes information confidential, we conclude that these documents are not excepted from disclosure by section 552.103. However, as we next discuss, these documents contain some information that must be redacted as confidential under other law as well as other information that the city may be required to redact if certain conditions are met.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The documents titled "City of Bonham Individual Earning Register," which we find are among the documents subject to release, include the amount of federal tax and FICA withholding for a named individual. Title 26, section 6103(a) of the United States Code renders tax return information confidential. "Return information" is defined by federal law to include:

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, over assessments, 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.

26 U.S.C. § 6103(b)(2)(A). We believe the federal tax withholding and FICA amounts constitute "return information" as defined above. Thus, the city must redact the federal withholding and FICA amounts as information made confidential under other law.

Some of the documents that are subject to release contain social security number information of named individuals, which you have marked. This information may be excepted from disclosure under section 552.117 or section 552.101 of the Government Code in conjunction with federal law. Section 552.117(1) excepts from required public disclosure the home

address, home telephone number, social security number, or personal family member information of a public employee who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.024, .117(1). However, you may not withhold this information under section 552.117(1) if the named individual made the request for confidentiality under section 552.024 after the present request for information was received by the city. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). Thus, section 552.117(1) requires you to withhold social security numbers of individuals only if the individual requested that this information be kept confidential under section 552.024 prior to the city's receipt of the present request. *See also* Open Records Decision Nos. 622 (1994), 455 (1987). Pursuant to section 552.117(1), we have also marked for possible redaction from the documents titled "City of Bonham Individual Earning Register" certain additional information that must be withheld *provided* the individual made a timely section 552.024 election to withhold information that reveals whether the individual has family members.

If any of the social security numbers in the documents that are subject to release is not excepted under section 552.117 (as discussed above), the information nevertheless may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that were obtained or are maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* ORD 622. We have no basis for concluding that the social security number information in the records here is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. *See* Gov't Code § 552.352. Thus, prior to releasing any of the social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Finally, we address the section 552.102 assertion as to the documents that are subject to release. Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, we consider together whether section 552.102 or section

552.101 in conjunction with the common law right of privacy applies to any of the information contained in the documents that are subject to release.

Information must be withheld from the public as implicating the common law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). Applying this test, this office has found that certain types of personal financial information, not relating to a financial transaction between an individual and a governmental body, is information that implicates the common law right to privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). As to the documents titled "City of Bonham Individual Earning Register" and "City of Bonham Monthly Retirement Report," we have identified certain information which the city may be required to redact as implicating the common law right to privacy of certain named individuals. If the individual's participation in a retirement plan is optional, we believe the amounts the individual contributes to the plan is the type of information protected from disclosure under the common law right to privacy as revealing a personal financial decision. *See* Open Records Decision No. 600 at 10-11 (1992). Likewise, if an individual's participation in a medical insurance plan is optional and if the enrollment in the plan has not been funded in whole or in part by public funds, we believe that notations that reveal such participation, as well as the amounts paid, constitute information protected by the common law right to privacy. We have marked a sample of the categories of information that you must redact, pursuant to sections 552.101 and 552.102 in conjunction with the common law right to privacy, if the above-described conditions are met. The remaining information in the documents that we have marked with green flags must be released to the requestor, to the extent that this information is responsive to the request.

In summary, the requested information is excepted from required public disclosure by section 552.103 of the Government Code, as provided above,² except that those documents that consist of or contain information subject to section 552.022 of the Government Code are not excepted by section 552.103, nor is the document we have marked with a yellow flag. The yellow-flagged document must be released in its entirety. The information in the documents that are subject to section 552.022 is also subject to required release, but only to the extent that this information is not made confidential under other law. In the representative sample you have submitted for our review, we have marked with green flags the types of documents that the city must release pursuant to section 552.022. We have also marked certain information in these documents and provided instructions as to the specific

²Because section 552.103 is dispositive, we do not address the section 552.101 or 552.102 assertions with respect to those types of documents that this decisions concludes may be withheld pursuant to section 552.103. However, as noted above, some of these documents may contain confidential information that must be withheld even after the section 552.103 exception no longer applies.

information that the city may be required to redact, as provided above, prior to the release of the green-flagged documents.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

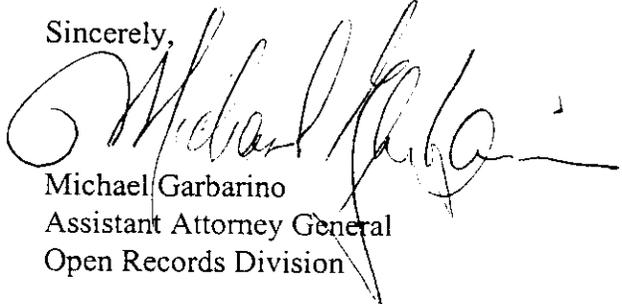
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is written in a cursive style with a long horizontal stroke at the end.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 139370

Encl. Submitted documents

cc: Mr. Roger Sanders
Sanders, O'Hanlon & Motley, P.L.L.C.
111 South Travis Street
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(w/o enclosures)