



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

January 23, 2003

Mr. Scott A. Durfee  
General Counsel  
Office of the District Attorney  
1201 Franklin Street, Ste. 600  
Houston, Texas 77002

OR2003-0459

Dear Mr. Durfee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175437.

The Office of the Harris County District Attorney (the "district attorney") received a written request for the personnel file of a former employee. You contend that portions of the requested information are excepted from required disclosure pursuant to sections 552.101, 552.102, and 552.117 of the Government Code. Representatives of the former employee have also submitted arguments to this office as to why portions of the requested documents are excepted from public disclosure. *See Gov't Code § 552.304.*

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Some of the records at issue contain the former employee's fingerprints. Sections 559.001, 559.002, and 559.003 to the Government Code provide as follows:

**Sec. 559.001. DEFINITIONS.** In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

**Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER.** A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

- (A) the individual consents to the disclosure;
- (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
- (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

The submitted documents include fingerprint information that is governed by these statutes. It does not appear to this office that section 559.002 permits the disclosure of this information to the requestor. Therefore, the district attorney must withhold all fingerprint information pursuant to section 559.003 of the Government Code.

Also among the records at issue are the employee's W-4 forms. These forms constitute confidential "tax return information" and as such must be withheld in their entirety pursuant to federal law. *See* 26 U.S.C. § 6103.

You next contend that some of the submitted information is excepted from public disclosure pursuant to section 552.102(a) of the Government Code. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.); *see also Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information that relates to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has also determined that

common law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982). Additionally, information revealing a public employee's decision whether to participate in an insurance plan that his or her employer offers (but does not fund), as well as other personal financial decisions, including the employee's designation of beneficiary, is considered intimate and of no legitimate public interest. *See* Open Records Decision No. 600 (1992). We have marked a representative sample of the documents submitted as part of the "Payroll" file to indicate the types of information the district attorney must withhold to protect the privacy interests of the former employee. We have also marked additional information that must be withheld to protect the privacy interests of other individuals.

Finally, you contend that portions of the submitted records are excepted from public disclosure pursuant to section 552.117 of the Government Code. Section 552.117(1) requires that the district attorney withhold an employee's home address, home telephone number, social security number, and information that reveals whether the employee has family members, but only if the employee elected to keep this information confidential in accordance with section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, in order to withhold section 552.117(1) information from the public, a proper election must be made prior to the receipt of the request for information. In this instance, you have demonstrated that the former employee has timely elected to keep her section 552.117(1) information confidential. We therefore conclude that the district attorney must withhold the employee's home address, home telephone number, social security number, and information that reveals whether the employee has family members wherever that information is found in the submitted documents.

In summary, the district attorney must withhold all fingerprint information, the information that comes within the common-law right of privacy, and the former employee's section 552.117(1) information. The remaining submitted information must be released to the requestor.

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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



W. Montgomery Meitler  
Assistant Attorney General  
Open Records Division

WMM/RWP/lmt

Ref: ID# 175437

Enc: Marked documents

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