



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

July 15, 2003

Ms. Elizabeth Slate Horn  
General Counsel  
Dallas Housing Authority  
3939 North Hampton Road  
Dallas, Texas 75212

OR2003-4913

Dear Ms. Horn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184237.

The Dallas Housing Authority (the "Authority") received a request for documents relating to investigations into allegations made against the requestor's client by another employee of the authority. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Initially, we address the authority's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

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<sup>1</sup>We assume that the 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 submitted to this office.

In this instance, you state that the request was received on April 22, 2003. Therefore, the authority was required to submit the requested information no later than May 13, 2003. You sent a portion of the requested information to this office on May 14, 2003 and stated that you were not including any information that you deemed to be subject to the attorney-client privilege. Thus, you failed to provide a copy of the specific information requested or representative samples within the fifteen-day deadline as required by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *Open Records Decision No. 319* (1982). Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. *Open Records Decision No. 150 at 2* (1977).

In this instance, you assert that certain unsubmitted information is protected by the attorney-client privilege and excepted from disclosure under section 552.107 of the Government Code. However, this section is a discretionary exception that protects a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information in this instance. *See Open Records Decision Nos. 663 at 5* (1999) (governmental body that fails to comply with procedural requirements of section 552.301 waives claim of section 552.107), *630 at 4* (1994) (predecessor to section 552.107(1) may be waived); *see also Open Records Decision No. 522* (1989) (discretionary exceptions in general). Thus, you must release the unsubmitted attorney notes in accordance with section 552.302. However, you claim sections 552.101 and 552.102 for information such as that which you have submitted; because these exceptions can provide compelling reasons to overcome the presumption of openness, we will address those arguments.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. Section 1703.306 of the Occupations Code provides that "a person for whom a polygraph examination is conducted . . . may not disclose information acquired from a polygraph examination to another person other than: (1) the examinee or any other person specifically designated in writing by the examinee." *Occ. Code § 1703.306(a)(1)*. Thus, in accordance with sections 552.101 and 1703.306, the authority must withhold the polygraph information that we have marked, unless the examinees have specifically designated in writing that the requestor may receive information obtained from their polygraphs.

Section 552.101 also encompasses information made confidential under federal law. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Tax return information is defined as data furnished to or collected by the Internal Revenue Service with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). The submitted W-4 forms are tax return information and must be withheld unless their release is authorized under section 6103(c). *See* 26 U.S.C. § 6103(c) (providing for release of tax return information).

You also contend that the requested information is excepted from disclosure under section 552.102 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." This exception 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 1) 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* 2) 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.).

Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). In addition, this office has found that the following types of information are excepted from required public disclosure under privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history), certain personal choices relating to financial transactions between the individual and the governmental body, *see* Open Records Decision No. 600 (1992) (federal tax Form W-4; designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), information concerning the intimate relations between individuals and their family

members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Having reviewed the submitted documents, we agree that some of the information is highly intimate or embarrassing and not of legitimate public interest and must therefore be withheld pursuant to section 552.102. We conclude, however, that the remaining information may not be withheld under section 552.102. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We have marked the types of information that must be withheld pursuant to this exception.

In addition, we note that section 552.117 of the Government Code may apply in this instance. This section excepts from disclosure the home addresses, home 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. Whether a particular piece of 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, pursuant to section 552.117(a)(1), the authority must withhold the above-listed information for all current or former officials or employees who elected, prior to the authority's receipt of this request, to keep such information confidential. The authority may not withhold such information under section 552.117 for anyone who did not make a timely election. Because information is excepted under section 552.117 only to protect the privacy interests of government employees and their families, the requestor has a special right of access to information concerning his client. *See* Gov't Code § 552.023(b) (governmental body may not deny access to information to person to whom information relates or his representative on grounds that information is considered confidential solely on the basis of privacy). We have marked a sample of the types of information that must be withheld under section 552.117 if timely elections were made.

Regardless of whether the employees at issue made timely elections under section 552.024, their social security numbers may be excepted from disclosure under section 552.101. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained and 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* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers at issue are 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 Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, the authority should ensure that such numbers are not obtained or maintained pursuant to any provision of law enacted on or

after October 1, 1990. However, because the laws regarding the confidentiality of social security numbers are intended to protect individuals' privacy, the requestor has a special right of access to his client's social security number. *See* Gov't Code § 552.023(b).

Finally, we note that the submitted documents include motor vehicle record information. Section 552.130(a)(1) of the Government Code requires the authority to withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Because section 552.130 is intended only to protect privacy interests, the requestor has a special right of access to information concerning his client. *See* Gov't Code § 552.023(b). We have marked the type of information that the authority must withhold pursuant to this exception.

In summary, we have marked information that the authority must withhold under sections 552.101 and 1703.306, unless the polygraph examinees have designated in writing that the requestor may receive information acquired from their polygraph examinations. The submitted W-4 forms must be withheld unless their release is authorized under section 6103(c) of title 26 of the United States Code. We have also marked the types of information that must be withheld under section 552.102. Pursuant to section 552.117(a)(1), the authority must withhold the home addresses, home telephone numbers, social security numbers, and family member information of current or former officials or employees, other than the requestor's client, who timely elected to keep such information confidential. Social security numbers of individuals other than the requestor's client must be withheld if obtained or maintained pursuant to a law enacted on or after October 1, 1990. Under section 552.130, the authority must withhold the marked motor vehicle record information that pertains to individuals other than the requestor's client. The remaining information must be released to this requestor.<sup>2</sup>

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.

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<sup>2</sup>Since the records being released include information that would ordinarily be withheld under laws and exceptions intended to protect the requestor's client's privacy, the authority must request another ruling from this office if it receives another request for this information from someone other than the requestor's client or that individual's authorized representative.

*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).

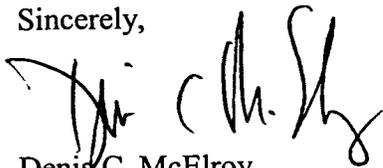
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 184237

Enc. Submitted documents

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