



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 6, 2003

Ms. Paige H. Saenz
Barney Knight & Associates
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2003-7036

Dear Ms. Saenz:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 188862.

The Lago Vista Police Department (the "Department"), which you represent, received a request for copies of "all reports, notes, memos, [sic] pertaining to" a named former Department police officer. You indicate the Department will release some responsive information to the requestor; however, you assert portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.115, 552.117, 552.1175, and 552.130 of the Government Code. We reviewed the information you submitted and considered the exceptions you claim.

Initially, we note the submitted documents contain information that is not responsive to the request. Accordingly, this ruling does not address the releasability of such information, which we have marked as unresponsive.

Next, we address your claims under section 552.101 of the Government Code, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses confidentiality provisions of other statutes and the doctrine of common-law privacy.

Section 6103(a) of title 26 of the United States Code makes federal tax return information confidential. *See* 26 U.S.C. § 6103(a). The term "return information" includes "the nature,

source, or amount of income” of a taxpayer. See 26 U.S.C. § 6103(b)(2). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff’d in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Our office has specifically held that a governmental body must withhold Form W-4 in its entirety. Open Records Decision No. 600 at 9 (1992). Therefore, the Department must withhold the submitted Form W-4 from disclosure under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

Also, the submitted information includes an Employment Eligibility Verification, Form I-9, governed by section 1324a of title 8 of the United States Code. This statute provides that Form I-9 “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). Release of this document under the Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the submitted Form I-9 is confidential under section 552.101; and therefore, the Department may release this form only in compliance with the federal laws and regulations governing the employment verification system.

We note that you seek to withhold an employer identification number; however, you have not directed us to a provision of law, nor are we aware of any, that makes the submitted federal employer identification number confidential. Therefore, you may not withhold this number under section 552.101 of the Government Code.

Next, you contend some of the submitted information warrants protection under privacy. 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 in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This provision encompasses the doctrine of common-law privacy. Accordingly, we address your privacy arguments under sections 552.101 and 552.102 together.

Common-law privacy protects information when (1) it contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the information. *Indus. Found. v. Tex.*

Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating 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. *Id.* at 683. 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, however, the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage that is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. See Open Records Decision No. 600 (finding personal financial information to include 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). In addition, information related to an individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common-law right to privacy. See Open Records Decision Nos. 545, 523 (1989). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. See Open Records Decision No. 600 at 10.

In this instance, the submitted documents contain information protected by common-law privacy. Therefore, the Department must withhold the information we have marked under sections 552.101 and 552.102 of the Government Code in conjunction with common-law privacy. We note that for information relating to health, dental, and life insurance, the Department must withhold such information as private only if these are optional plans offered by the Department.

Next, we address your other claimed exceptions under the Act. You contend section 552.115 of the Government Code excepts the submitted birth certificate from disclosure. Section 552.115 provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that "a birth record is public information and available to the public on and after the 50th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official." See Gov't Code § 552.115. However, as section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration official, the Department may not withhold the certification of birth in Exhibit F under this provision. See Gov't Code § 552.115; Open Records Decision No. 338 (1982).

Additionally, you contend section 552.117 of the Government Code excepts portions of the submitted information. You inform us that the submitted information pertains to a peace officer who is no longer employed the Department, but rather another law enforcement agency. We note that section 552.117(a)(4), as claimed by the Department, applies to peace officers¹ who were killed in the line of duty.² See Gov't Code § 552.117(a)(4). As the submitted information does not concern a peace officer killed in the line of duty, we conclude that the Department may not withhold any of the submitted information under section 552.117(a)(4) of the Government Code.

You also assert section 552.117(a)(2), which excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer made an election under section 552.024 or section 552.1175 of the Government Code. You inform us that the individual at issue is currently a licensed peace officer. Therefore, we agree that you must withhold the information you have redacted pursuant to section 552.117(a)(2). See Open Records Decision No. 670 (2001) (authorizing governmental bodies to withhold information governed by section 552.117(a)(2) without necessity of requesting attorney general decision). We have marked additional information that the Department also must withhold under section 552.117(a)(2).³

Further, you argue the submitted documents contain information excepted from disclosure by section 552.130 of the Government Code. Section 552.130 excepts from public disclosure information relating to a driver's license or a motor vehicle title or registration issued by an agency of this state. The submitted information contains motor vehicle information and thus, we agree that the Department must withhold such information, which we have marked, under section 552.130 of the Government Code.⁴

Last, you claim the submitted Department of Defense Form DD-214 is governed by House Bill 545, which the Seventy-eighth Legislature recently enacted. House Bill 545 amends the Act by adding section 552.140, which provides, in relevant part, as follows:

¹"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

² In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. See Act of May 30, 2003, 78th Leg., R.S., S.B. 1388, § 1 (to be codified as an amendment to Gov't Code § 552.117).

³ As section 552.117 is dispositive, we need not address your arguments under section 552.1175 of the Government Code.

⁴ As section 552.130 is dispositive, we need not address your arguments under chapter 730 of the Transportation Code. Further, we note that though you seek to withhold information under chapter 521 of the Transportation Code, you do not direct us to a specific provision of this chapter, and we are unaware of any, that would make the remaining information at issue in Exhibit E confidential.

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Act of May 22, 2003, 78th Leg., R.S., ch. 438, § 1, 2003 Tex. Sess. Law Serv. 1685. Here, the Department possessed the submitted DD-214 prior to September 1, 2003. Therefore, section 552.140 does not apply in this instance.

In summary, the Department must withhold the following information under section 552.101 of the Government Code in conjunction with the stated statute or doctrine: 1) Form W-4 under section 6103 of title 26 of the United States Code; 2) Form I-9 in accordance with section 1324a of title 8 of the United States Code; and 3) the information we have marked under section 552.102 and common-law privacy. The Department must withhold the officer's personal information under section 552.117(a)(2) of the Government Code. The Department must withhold the information we have marked under section 552.130 of the Government Code. The Department must release the remainder of the submitted information 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,

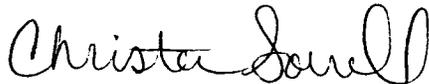
at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 188862

Enc: Submitted documents

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(w/o enclosures)