



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2004

Mr. James Hall
Assistant General Counsel
Texas Department of Criminal Justice
Office of the General Counsel
P. O. Box 4004
Huntsville, Texas 77342

OR2004-8518

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 210820.

The Texas Department of Criminal Justice (the "department") received a request for "the employee master file" of a deceased employee. You state that the requestor "will receive correspondence from TDCJ Human Resources regarding information that is [releaseable]." You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.115, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.102 of the Government Code 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 v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101

encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. You indicate that the submitted documents contain personal financial information relating to the deceased employee. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. See Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note, however, that a person's common-law right of privacy terminates upon death. *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); see also *Justice v. Belo Broadcasting Corp.* 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded") (quoting Restatement of Torts 2d); See Attorney General Opinion JM-229 (1984) ("the right of privacy lapses upon death"), Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death"). Thus, none of the submitted information may be withheld on the basis of the decedent's common-law right of privacy.

However, if the release of information about a deceased person reveals highly intimate or embarrassing information about a living person, the information is protected by common-law privacy on the basis of the living person's privacy interest. See Attorney General Opinion JM-299 (1984). In this regard, we note that the submitted documents contain beneficiary information. The beneficiary has a common-law privacy interest in some of the financial information at issue. See Open Records Decision No. 373 at 3 (1983). Thus, to the extent the submitted information reveals the identity of a currently designated, living beneficiary, such information must be withheld pursuant to section 552.101 in conjunction with common-law privacy on the basis of the beneficiary's privacy interest. We have marked the submitted documents accordingly.

You also assert that portions of the submitted information are protected by constitutional privacy, which is also incorporated by section 552.101 of the Government Code. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy and includes only information that concerns the "most intimate aspects of human affairs." *Id.* at 5

(citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). As noted above, the right of privacy lapses at death. Attorney General Opinions JM-229 (1984); H-917 (1976). We have considered your arguments and reviewed the information at issue. We conclude, however, that none of the information comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. See Open Records Decision Nos. 470, 455, 444, 423 at 2. We therefore find that none of this information may be withheld on the basis of constitutional privacy.

Section 552.101 also encompasses information made confidential by statute. 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-2 and W-4 forms are tax return information and must be withheld unless release is authorized under section 6103(c). See 26 U.S.C. § 6103(c) (providing for release of tax return information).

The submitted documents also include an Employment Eligibility Verification, form I-9. Form I-9 is governed by section 1324a of title 8 of the United States Code, which provides that an I-9 form and "any information contained in or appended to such 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. See 8 U.S.C. § 1324a(b)(5); see also 8 C.F.R. § 274a.2(b)(4). Release of the I-9 form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We note that the submitted documents include an accident report that appears to have been completed pursuant to chapter 550 of the Transportation Code. See Transp. Code § 550.064. Section 550.065(b) of the Transportation Code provides that, except as provided by subsection (c), accident reports are privileged and confidential. See Transp. Code § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. See Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. See *id.* In this case, the requestor has not provided the department with two or more of the pieces of information required under section 550.065(c)(4). Accordingly, the accident report form we have marked is confidential under section 550.065(b) of the Transportation Code and, thus, is excepted from disclosure pursuant to section 552.101 of the Government Code.

You assert that the submitted death certificate is excepted under section 552.115. This section provides that a death 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 death record is public information and available to the public on and after the 25th anniversary of the date of death as shown on the record filed with the bureau of vital statistics or local registration official." Since section 552.115 only applies to a death certificate maintained by the bureau of vital statistics or local registration official, the department may not withhold the submitted death certificate pursuant to this provision. See Open Records Decision No. 338 (1982).

We now turn to your claim regarding section 552.117 of the Government Code. Section 552.117(a)(3) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of the department. See Gov't Code § 552.117(a)(3). However, we note that because section 552.117(a)(3) deems social security numbers confidential in order to protect the privacy of living individuals, and not deceased persons, this aspect of section 552.117(a)(3) is purely personal and lapses at death. See *Moore*, 589 S.W.2d 489; see also Attorney General Opinions JM- 229 (1984); H-917 (1976). Therefore, the decedent's social security number is not excepted from disclosure under section 552.117(a)(3). Other information within the submitted documents must be withheld from disclosure under section 552.117(a)(3). We have marked this information accordingly.

You contend that the submitted Texas driver's license information is excepted under section 552.130 of the Government Code. This section states that "[i]nformation is excepted from [required public disclosure] if the information relates to: (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" However, section 552.130 is designed to protect individuals' privacy interests, and the right to privacy expires at death. See *Moore*, 589 S.W.2d 489; see also Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). Accordingly, the photocopied driver's license may not be withheld under section 552.130.

In summary, the department must withhold the information we have marked as being excepted under section 552.101 in conjunction with common-law privacy. In addition, the W-2, W-4, and I-9 forms are confidential and may be released only as authorized by federal law. The department must withhold the marked accident report under section 552.101 in conjunction with section 550.065 of the Transportation Code. The marked home addresses, home telephone numbers, and family member information must be withheld under section 552.117(a)(3). The remaining information must be released.

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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/krl

Ref: ID# 210820

Enc. Submitted documents

c: Ms. Terri S. Hilliard-Fleming
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(w/o enclosures)