ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 20, 2005

Mr. Fred Hernandez
District Attorney
63rd Judicial District
P.O. Box 1405
Del Rio, Texas 78841-1405

OR2005-08587

Dear Mr. Hernandez:

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# 232556.

The Office of the District Attorney of the 63rd Judicial District (the "district") received a request for nine categories of information pertaining to task force case logs, agents, and confidential informants, excluding the names and identifying information of any current informants. You state that the district does not have information responsive to some of the requested categories of information.[1] You also have withheld social security numbers in the submitted documents. *See* Gov't Code § 552.147(b) (governmental body may withhold social security number of living person without requesting decision from this office under the Act). You state that some of the requested information has been made available to the requestor, but claim that some of the requested information is excepted from disclosure under section 552.108 of the Government Code, and we understand you to assert that some of the

[1]We note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.–San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

submitted information is excepted under section 552.101 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.[2]

Initially, we note that, for the requested copies of current confidential informant agreements, the requestor states that "names and identifying information redacted is fine[.]" Thus, the identifying information of current informants in the submitted information is not responsive to the request for information. This ruling therefore does not address the public availability of this nonresponsive information, and the district is not required to release this information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.–San Antonio 1978, writ dism'd).

We also note that you have redacted from the submitted documents information that you seek to withhold. The district is not required to submit social security numbers to this office pursuant to section 552.147, and we note that a government body may withhold a peace officer's home address and telephone number, personal cell phone and pager numbers, social security number, and family member information under section 552.117(a)(2) without requesting a decision from this office. *See* Open Records Decision No. 670 (2001); Gov't Code § 552.147(b). However, you have also redacted information that is not subject to section 552.147 or section 552.117(a)(2). You do not assert, nor does our review of our records indicate, that you have been authorized to withhold this information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested" or representative sample), 552.302.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and it encompasses information protected by other statutes, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

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[2]We assume that, to the extent any additional responsive information existed when the district received the request for information, you have released it to the requestor. If not, then you must do so immediately. *See* Gov't Code §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000).

> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, 159.005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked the portion of the submitted information that constitutes medical records and that may only be released in accordance with the MPA. Open Records Decision No. 598 (1991).

The submitted information contains F-5 forms (Report of Separation of License Holder). These forms are made confidential by section 1701.454 of the Occupations Code, which provides in relevant part that "[a] report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code. Occ. Code § 1701.454(a). The district must withhold the F-5 forms pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

The submitted information contains a fingerprint. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the district must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses 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). Accordingly, the W-4 tax forms in the submitted information are confidential under section 6103(a), and the district must withhold them under section 552.101 of the Government Code.

The submitted information contains I-9 forms (Employment Eligibility Verification), which are governed by section 1324a of Title 8 of the United States Code. This section 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 forms in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the I-9 forms are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses common law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common law privacy does not protect an employee's social security number, date of birth, home address, or home telephone number. Attorney General Opinion MW-283 (1980) (public employee's date of birth not protected under privacy); Open Records Decision No. 455 (1987) (home addresses and telephone numbers of private citizens generally not protected under privacy); Open Records Decision Nos. 226 (1979) (social security numbers not protected under privacy). But 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* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989); *see also* Open Records Decision No. 600 (finding personal financial information to include choice of particular insurance carrier). The submitted documents contain personal financial information, and we do not believe that the public has a legitimate interest in it. *See* Open Records Decision Nos. 620 (1993), 600 (1992). Thus, we conclude that this information, which we have marked, is confidential under common law privacy, and the district must withhold it pursuant to section 552.101.

You assert that some of the remaining information, including the submitted L-1 forms, are excepted under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have not stated that the information at issue pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release

would interfere in some way with the detection, investigation, or prosecution of crime. Thus, you have not met your burden under section 552.108(a)(1), and you may not withhold any of the remaining information under section 552.108.

Some of the submitted information is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and 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(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer, as defined by article 2.12 of the Texas Code of Criminal Procedure, regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential. We have marked the information of police officers that the district must withhold under section 552.117(a)(2). If the employee at issue was not a peace officer at the time of the request, the district must withhold this same information under section 552.117(a)(1) if the employee elected to keep such information confidential prior to the district's receipt of the request for information.

The submitted information also contains Texas motor vehicle record information. Section 552.130 of the Government Code provides that a motor vehicle operator's, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The district must withhold the Texas motor vehicle record information we have marked under section 552.130.

Some of the remaining information is excepted under section 552.136 of the Government Code. Section 552.136(b) states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." The district must withhold the account numbers we have marked under section 552.136.

Finally, we note that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c), and you do not inform us that a member of the public has affirmatively consented to its release.

Therefore, the district must withhold the e-mail address we have marked under section 552.137.

To conclude, pursuant section 552.101 of the Government Code, the district must withhold the following: (1) the medical records, which may only be released in accordance with the MPA; (2) the F-5 forms, which are confidential under section 1701.454 of the Occupations Code; (3) the marked fingerprint, which is confidential under section 560.003 of the Government Code; (4) the W-4 tax forms, which are confidential under section 6103 of title 26 of the United States Code; (5) the I-9 forms, which may only be released in compliance with the federal laws and regulations governing the employment verification system; and (6) the marked information that is confidential under common law privacy. The district must also withhold (1) the information marked under section 552.117 if the employee at issue was a peace officer at the time of the request or if the employee elected to keep such information confidential prior to the district's receipt of the request for information; (2) the marked Texas motor vehicle record information under section 552.130; (3) the marked account numbers under section 552.136; and (4) the marked e-mail address under section 552.137. The district must release the remaining information.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 232556

Enc. Submitted documents

c: Mr. Scott Henson
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(w/o enclosures)