



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 4, 2006

Ms. Leslie Lockhart
Adams & Graham, L.L.P.
P.O. Drawer 1429
Harlingen, Texas 78551

OR2006-14200

Dear Ms. Lockhart:

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# 265984

The Cameron Appraisal District (the "district"), which you represent, received a request for all documents pertaining to the dismissal and investigation of a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.117 of the Government Code, as well as Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative samples.¹

Initially, we note that portions of the submitted information are subject to section 552.022 of the Government Code, which provides in pertinent part as follows:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹We assume that the "representative 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.

public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes completed performance evaluations in Exhibit 2 and a completed investigation by a private investigator for the district in Exhibit 3A. Consequently, unless this information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law, it must be released to the requestor. Although you raise sections 552.103 and 552.107 of the Government Code for Exhibit 3A, we note that these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 5-6 (2002) (attorney-client privilege under section 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Therefore, the district may not withhold the investigation information pursuant to sections 552.103 or 552.107 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Open Records Decision Nos. 677 (2002), 676. Sections 552.101, 552.102, and 552.117 are also other law for purposes of section 552.022. Accordingly, we will address whether the information subject to section 552.022 is excepted under Texas Rule of Evidence 503, Texas Rule of Civil Procedure 192.5, or section 552.101, section 552.102, or section 552.117 of the Government Code.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You inform us that Exhibit 3A is a communication between district employees, the district’s attorney, and an investigator hired by district to investigate a former employee. You also inform us that the investigator prepared the report to assist the district’s attorney in evaluating a legal issue. Having considered your representations and reviewed the information at issue, we find you have established that the information in Exhibit 3A constitutes privileged attorney-client communication; therefore, the district may withhold the information in Exhibit 3A under rule 503.²

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. We note that the submitted information includes W-4 and tax levy forms. 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 “tax liability . . . prepared by . . . or collected by the Secretary with respect to the determination of the existence, or possible

²As we are able to resolve this under rule 503, we do not address your other arguments for exception of this information.

existence, of liability (or the amount thereof) of any person under this title for any tax[.]” *See id.* § 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). Therefore, we conclude that information pertaining to a tax levy constitutes “tax return information” as contemplated by section 6103(a) of title 26 of the United States Code. *See Johnson v. Sawyer*, 120 F.3d 1307, 1330 (5th Cir. 1997) (tax return information is confidential unless disclosure is permitted by exception found in section 6103) (*citing Chandler v. United States*, 687 F. Supp. 1515, 1516 n.1 (C.D. Utah 1988), *aff’d*, 887 F.2d 1397 (10th Cir. 1989) (notice of levy disclosed tax return information)). Thus, the district must withhold the submitted W-4 and tax levy forms, which we have marked, in accordance with federal law.

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 Tex. 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(a) 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).

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common law privacy. *See Open Records Decision Nos. 600* (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), 545 (1990). However, where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not private under section 552.101. *See Open Records Decision No. 600* at 9 (basic facts of group insurance provided by governmental body not protected by common-law privacy).

Upon review, we find that some of the submitted records contain personal financial information that is protected under common law privacy. Accordingly, the district must withhold the information we have marked under section 552.102 in conjunction with common law privacy.

Next, we address your claim that portions of the submitted information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security number, 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 of the Government Code. Gov't Code § 552.117(a)(1). We note that section 552.117 does not encompass an employee's date of birth. Whether 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). You inform us, and provide documentation showing, that the employee at issue timely elected to keep his personal information confidential under section 552.024. Thus, with the exception of the information we have marked for release, the district must withhold the personal information you have marked under section 552.117. We have also marked additional information that the district must withhold under section 552.117.

Next, we note that section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or] a motor vehicle title or registration issued by an agency of this state[.]" Gov't Code § 552.130. Accordingly, the district must withhold the Texas motor vehicle record information you have marked, as well as the additional information we have marked, pursuant to section 552.130.

Finally, we note that section 552.136 of the Government Code 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." *Id.* § 552.136. Thus, the district must withhold the insurance policy numbers we have marked under section 552.136.

In summary, the district may withhold the information in Exhibit 3A under rule 503 of the Texas Rules of Evidence. The district must withhold the submitted W-4 and tax levy forms, which we have marked, in accordance with federal law. With the exception of the information we have marked for release, the district must also withhold the marked information under (1) section 552.102 in conjunction with common law privacy, (2) section 552.117 of the Government Code, (3) section 552.130 of the Government Code, and (4) section 552.136 of the Government Code. The remaining submitted 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, 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,

A handwritten signature in cursive script that reads "Shelli Egger". The signature is written in black ink and is positioned above the typed name and title.

Shelli Egger
Assistant Attorney General
Open Records Division

SE/sdk

Ref: ID# 265984

Enc. Submitted documents

c: Dr. Phil Howell
c/o Leslie Lockhart
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(w/o enclosures)