



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 5, 2006

Mr. Rod Ponton
Attorney at Law
P. O. Box 9760
Alpine, Texas 79831

OR2006-05854

Dear Mr. Ponton:

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# 250803.

The City of Alpine (the "city") received four requests from three requestors for financial information regarding a named employee, salary information for three positions, two categories of communications, copies of four city policies, and copies of several specified checks. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have only submitted financial information for the named employee and the specified checks for our review. To the extent any other information responsive to the request existed on the date the city received this request, we assume you have released it. If not, the city must release any such information immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

Next, we note that you have redacted information from the submitted documents that you seek to withhold. You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any information with the exception of social security numbers without seeking a ruling from this office. *See* Gov't Code §§ 552.301(a), .147

(authorizing a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act); Open Records Decision No. 673 (2001). 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 on that information 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.

Next, we must address the city's obligations under the Act. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. See Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. See *id.* § 552.301(e)(1)(A)-(D). The city received four requests between March 10, 2006 through March 23, 2006. You did not provide this office with a copy of the specific information requested or representative samples until May 15, 2006. Based on the foregoing, we conclude that you failed to comply with section 552.301.

When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *Hancock*, 797 S.W.2d at 381-82. Normally, a compelling interest exists when some other source of law makes the information confidential or when third party interests are at stake. Open Records Decision No. 150 at 2 (1977). 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). Sections 552.101 and 552.102 can provide compelling reasons to overcome the presumption of openness. We will therefore address your arguments under sections 552.101 and 552.102.

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. As you assert, 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 existence, of liability (or the amount thereof) of any person under this title for any tax[.]” *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). Therefore, we conclude 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 city must withhold the tax levy information, which we have marked, in accordance with federal law.

Section 552.101 also encompasses the common law right to privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Section 552.102(a) 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). Accordingly, we will consider your section 552.101 and section 552.102 claims together. Information is protected from disclosure under the common law right to privacy if (1) it contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *See id.* at 685. The type 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. After reviewing the submitted information, we find that none of the information at issue is private information. Accordingly, we find that none of the remaining submitted information is excepted from disclosure under either section 552.101 or 552.102 of the Government Code.

Finally, we note that a portion the submitted information includes an account number. Section 552.136 of the Government Code provides 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.” Gov’t Code § 552.136.¹ Accordingly, the city must withhold the account number, which we have marked, in the submitted information pursuant to section 552.136.

In summary, the city must withhold the tax information, which we have marked, under section 6103 of title 26 of the United States Code. The account number, which we have marked in the submitted information, must be withheld under 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

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Brian J. Rogers
Assistant Attorney General
Open Records Division

BJR/krl

Ref: ID# 250803

Enc. Submitted documents

c: Ms. Molly Bailey Potter
Border Hotline
P. O. Box 184
Alpine, Texas 79831
(w/o enclosures)