



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 18, 2007

Mr. Scott Kelly
Deputy General Counsel
Texas A&M System
200 Technology Way Suite 2079
College Station, Texas 77845-3424

OR2007-00571

Dear Mr. Kelly:

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# 269434.

Texas A&M University - Kingsville (the "university") received a request for (1) information contained in a named individual's personnel file and records relating to his job duties; (2) investigative information relating to an accident; and (3) information relating to the individual's use of a certain vehicle. You state that the university will withhold the individual's social security number under section 552.147 of the Government Code.¹ You claim that other responsive information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.² We also received correspondence from the requestor.³

¹Section 552.147(a) provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147(a). Section 552.147(b) authorizes 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.

²This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the university to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

³See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Gov’t Code § 552.022(a)(1). The university does not raise section 552.108. Section 552.022(a)(3) provides for the required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body,” unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). In this instance, the submitted information includes a completed report and completed evaluations that are subject to section 552.022(a)(1), as well as contracts that are subject to section 552.022(a)(3). Although you seek to withhold the information that is subject to section 552.022 under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov’t Code § 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the university may not withhold any of the information that is subject to section 552.022 under section 552.103.

With respect to the remaining information, we address your claim under section 552.103, which provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of*

Tex. Law Sch. v. Tex. Legal Found., 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. See Open Records Decision No. 551 at 4 (1990) *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* You contend that the university reasonably anticipates litigation involving the individual who is the subject of the submitted information. You inform us that the federal government, as the defendant in a pending lawsuit arising out of an accident involving the individual in question, has alleged that the individual was acting as an employee of the university and not as a federal employee.⁴ You assert that this allegation establishes that litigation against the university is reasonably anticipated. Having considered your arguments, we conclude that you have not demonstrated that the university reasonably anticipated litigation on the date of its receipt of this request for information. See Open Records Decision No. 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger statutory predecessor to Gov’t Code § 552.103). Therefore, the university may not withhold any of the submitted information under section 552.103.

Next, we address your privacy claims under sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses the common-law right to privacy. Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

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). Section 552.102(a) is applicable to information that relates to public officials and employees. The privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 and *Industrial Foundation*. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (addressing statutory predecessor). Accordingly, we will determine whether any of the information that you claim is private is excepted from disclosure under section 552.101.

⁴You have provided copies of the pleadings in the lawsuit, which is styled *David Gonzalez et al. v. United States of America*, No. C-06-352, United States District Court, Southern District of Texas.

In this instance, the information at issue pertains to a university employee. As this office has often stated, information that relates to public employment and public employees is generally a matter of legitimate public interest. See, e.g., Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Nevertheless, personal financial information relating to a public employee may be protected by common-law privacy. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but 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 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g., Open Records Decision Nos. 600 at 9-12 (1992) (participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, the designation of the beneficiary of an employee's retirement benefits and an authorization of direct deposit of an employee's salary are protected by common-law privacy. See Open Records Decision No. 600 at 9-12. But 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 id. at 9 (basic facts of group insurance provided by governmental body not protected by common-law privacy).*

We agree that the university must withhold the employee's beneficiary designations, which we have marked, under section 552.101 in conjunction with common-law privacy. We have marked other personal financial information that must also be withheld on this basis, provided that none of the marked information relates to an employee benefit that the university financed in whole or in part. To the extent that it relates to such a benefit, the marked information is not protected by common-law privacy and may not be withheld under section 552.101.

Section 552.101 also encompasses information that other statutes make confidential. Section 6103(a) of title 26 of the United States Code makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of

income” of a taxpayer. 26 U.S.C. § 6103(b)(2). The university must withhold the submitted W-4 form under section 552.101 in conjunction with section 6103.

We note that the university may be required to withhold some of the remaining information under section 552.117 of the Government Code.⁵ Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. The determination of whether a particular item of information is protected by section 552.117(a)(1) must be made at the time of the governmental body’s receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for the information. A governmental body may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the information confidential. We have marked information that must be withheld under section 552.117(a)(1) if the employee in question timely requested confidentiality for that information under section 552.024.

You also raise section 552.130 of the Government Code, which 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. *See* Gov’t Code § 552.130(a)(1). We have marked Texas driver’s license information that the university must withhold under section 552.130.

Lastly, we address your claim under section 552.136 of the Government Code, which provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

⁵This office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

(b) Notwithstanding 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. You state that the submitted information includes a personal identification number and a universal identification number that are used to access employee payroll and benefit information. Based on your representations, we conclude that the university must withhold the personal and universal identification numbers under section 552.136.

In summary: (1) the marked beneficiary designations must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the other marked employee benefit information must also be withheld under section 552.101 and common-law privacy, to the extent that the information does not relate to a benefit that the university financed in whole or in part; (3) the W-4 form must be withheld under section 552.101 in conjunction with section 6103 of title 26 of the United States Code; (4) the university must withhold the information that we have marked under section 552.117(a)(1) of the Government Code if the employee in question timely requested confidentiality for that information under section 552.024 of the Government Code; (5) the marked Texas driver's license number must be withheld under section 552.130 of the Government Code; and (6) the personal and universal identification numbers must be withheld under section 552.136 of the Government Code. The rest of the 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

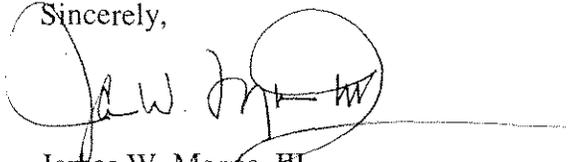
requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 black ink, appearing to read "J.W. Morris, III", is written over a horizontal line. The signature is enclosed within a hand-drawn circle.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/krl

Ref: ID# 269434

Enc: Submitted documents

c: Mr. Daniel G. Covich
Webb, Cason & Covich, P.C.
710 North Mesquite Street
Corpus Christi, Texas 78401
(w/o enclosures)