



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 13, 2007

Mr. Jerry M. Brown
Assistant General Counsel
The Texas A&M University System
Texas A&M System Building, Suite 2079
200 Technology Way
College Station, Texas 77845-3424

OR2007-11997

Dear Mr. Brown:

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# 289109.

The Texas A&M University System (the "system") received a request for the employment contract, personnel file, and recent salary history of a system employee, as well as all electronic mail written by the requestor that was sent or forwarded to that employee. You state that the system has no responsive employment contract or salary history.¹ You also state that the system will redact social security numbers pursuant to section 552.147 of the Government Code.² You claim that the submitted information is excepted from disclosure

¹We note that the Act does not require a government body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Section 552.147(b) of the Government Code 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.

under sections 552.101, 552.107, 552.117, and 552.136 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.

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. Section 552.101 encompasses information made confidential by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). 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). Thus, the submitted W-4 forms constitute tax return information that must be withheld under section 552.101 of the Government Code in conjunction with federal law.

Section 552.101 also encompasses common-law privacy, which 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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, a public employee’s allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about that decision is protected from disclosure by the common-law right to privacy. *See* ORD 600 (finding federal tax Form W-4 Employee’s Withholding Allowance Certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care related to personal financial decisions), 545 (1990) (deferred compensation plan). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not protected from disclosure by the common-law right to privacy. *See* ORD 600 at 10.

You state that the system’s optional retirement program (“ORP”) is funded in part by the state, and you acknowledge that there is a legitimate public interest in an employee’s participation in this program. However, you state that the selection of an ORP or other 403b vendor is a private, voluntary decision made independently by an employee. Upon review,

³Although you did not timely raise section 552.101 of the Government Code, this provision can constitute a compelling reason to withhold information, and we will address your arguments under this exception. *See* Gov’t Code §§ 552.301, .302.

we agree that the selection of an ORP or other 403b vendor is a private financial decision. Further, you note that the submitted documents contain additional information protected by common-law privacy. Accordingly, we have marked the information that is protected from disclosure by the common-law right to privacy. The system must withhold the marked information pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You assert that some of the requested information is excepted under section 552.107 of the Government Code. Section 552.107(1) protects information that falls within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See TEX. R. EVID. 503(b)(1)*. The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E)*. Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication. *Id.* 503(b)(1). This means the communication was “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).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The system asserts that some of the requested information consists of confidential communications between attorneys for, and employees of, the system made for the purpose of rendering professional legal advice. You have identified the parties to the

communications. You state that these communications were made in connection with the rendition of professional legal services to the system. You also state that the communications were intended to be and remain confidential. Based on these representations and our review of the information at issue, we agree the system has established that the information at issue in Exhibit D consists of privileged attorney-client communications that the system may withhold pursuant to section 552.107 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses, 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 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected under 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). Accordingly, if the employee at issue made a timely election to keep his personal information confidential, the system must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. The system may not withhold this information under section 552.117(a)(1) if the employee at issue did not make a timely election to keep the information confidential.

Next, 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.

(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 inform us that the information at issue contains a universal identification number that is used to access employee payroll and benefit information. Based on your representations, we agree that the system must withhold this information under section 552.136. We have also marked a bank account and routing number which must be withheld pursuant to section 552.136.

In summary, the system must withhold the submitted W-4 forms under section 552.101 of the Government Code in conjunction with federal law. The system must withhold the personal financial information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system may withhold the attorney-client communications at issue in Exhibit D pursuant to section 552.107 of the Government Code. If the employee at issue timely requested confidentiality for his information under section 552.024 of the Government Code, the system must withhold the information that we have marked under section 552.117(a)(1) of the Government Code. The system must withhold the information we have marked 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).

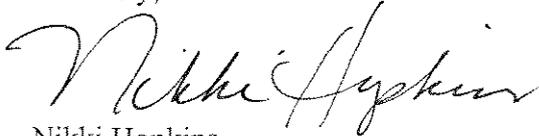
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 cursive script that reads "Nikki Hopkins". The signature is written in black ink and is positioned above the typed name.

Nikki Hopkins
Assistant Attorney General
Open Records Division

NH/mcf

Ref: ID# 289109

Enc. Submitted documents

c: Mr. Radoslov Dimitric
P.O. Box 382
Pittsburgh, Pennsylvania 15230
(w/o enclosures)