



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2007

Mr. Phillip A. McKinney
Attorney for Coastal Bend College
P.A. McKinney & Associates
P.O. Box 2747
Corpus Christi, Texas 78403

OR2007-16368

Dear Mr. McKinney:

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# 297003.

Coastal Bend College (the "college"), which you represent, received a request for ten categories of information related to a named college employee.¹ We understand you will provide the requestor with a portion of the requested information. You claim that portions of the remaining information are excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered your arguments and reviewed the submitted information, some of which is a representative sample.²

¹You inform us, and provide documentation showing, that the college sought clarification of part of the request from the requestor. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); Open Records Decision No. 633 at 5 (1999) (ten business-day deadline tolled while governmental body awaits clarification).

²We 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.

Initially, the college currently has a lawsuit pending against the Office of the Attorney General that pertains, in part, to some of the information submitted in Exhibit 8: *Coastal Bend College District v. Abbott*, No. D-1-GN-07-001274 (261st Dist. Ct., Travis County, Tex.). Accordingly, to the extent the information in Exhibit 8 is the same information that is at issue in the pending litigation, we will allow the trial court to determine whether this information must be released to the public. To the extent the information in Exhibit 8 is not the same information that is at issue in the pending litigation, we will consider the college's arguments against disclosure for this information.

Next, you inform us that you will withhold certain information, which you have not submitted for our review, pursuant to our ruling in Open Records Letter No. 2007-04354 (2007), in which we ruled the college must withhold criminal history record information pertaining to a named individual. You state that the responsive information you have not submitted includes criminal history record information for several people, including the named individual at issue in Open Records Letter No. 2007-04354. We understand you to indicate that the pertinent facts and circumstances have not changed since the issuance of that prior ruling. Thus, for the information pertaining to the named individual that is identical to the records at issue in Open Records Letter No. 2007-04354, we determine that the college must continue to rely on our prior ruling with respect to that information. *See* Gov't Code § 552.301(f); Open Records Decision No. 673 (2001) (a governmental body may rely on previous determination when the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). For the remaining responsive information that was not submitted for our review, we note that this information was not at issue in Open Records Letter No. 2007-04354. Accordingly, the college may not rely on our ruling in Open Records Letter No. 2007-04354 as a previous determination with respect to the remaining information. *See* ORD 673 (a governmental body may rely on previous determination when, among other things, the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D)). Additionally, because the college failed to submit the information, we have no basis on which to rule whether or not it may be withheld from disclosure under the Act. Consequently, this information must be released. If the college believes any of this information is confidential and may not lawfully be released, it must challenge this decision in court as outlined below. *See* Gov't Code § 552.352.

Next, we must address the college's obligations under section 552.301 of the Government Code when asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a

decision from this office and state the exceptions that apply within ten business days of receiving the written request. *Id.* § 552.301(b). You state that the college received the initial request for information on September 6, 2007 and indicate that the college asked the requestor to clarify part of the request on September 18, 2007. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). In Open Records Decision No. 663 (1999), this office determined that during the interval in which a governmental body and a requestor communicate in good faith to narrow or clarify a request, the Act permits a tolling of the statutory ten-business-day deadline imposed by section 552.301. Open Records Decision No. 663 at 5 (ten-day deadline is tolled during process but resumes, upon receipt of clarification or narrowing response, on day that clarification is received). Thus, the ten-business-day time period to request a decision from us under section 552.301(b) was tolled on the date that the college sought clarification of the request. *See Gov't Code* § 552.301(b). You state that the college received the clarification on September 25, 2007. Accordingly, we conclude that the ten-business-day time period for requesting a decision from our office resumed on September 26, 2007. Thus, the ten-business-day deadline was September 27, 2007. The college, however, did not request a ruling from this office until October 4, 2007. Consequently, we find the college failed to comply with the procedural requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you raise section 552.103 of the Government Code, this exception is discretionary in nature. It serves only to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); ORD 663 at 5 (governmental body may waive sections 552.103, 552.107, and 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Accordingly, the college may not withhold any of the submitted information pursuant to section 552.103. However, section 552.101 of the Government Code can provide a compelling reason to withhold information; therefore, we will consider the college's arguments under this exception.

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 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. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . or offense [.]” See 26 U.S.C. § 6103(b)(2)(A). 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), aff’d in part, 993 F.2d 1111 (4th Cir. 1993). Accordingly, the college must withhold the submitted W-2 forms pursuant to section 552.101 in conjunction with federal law.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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). 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. 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 it is excepted from disclosure under the common-law right of privacy. See ORD 545. However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. See ORD 600 at 10. You assert that portions of Exhibit 5 are protected by common-law privacy. We have reviewed this information and agree that some of the information is protected under common-law privacy. Accordingly, the college must withhold the information you have highlighted in yellow and pink, in addition to the information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. We find, however, that none of the remaining information in Exhibit 5 constitutes highly intimate or embarrassing information of no legitimate concern to the public. Therefore, the college may not withhold any of the remaining information in Exhibit 5 under section 552.101 in conjunction with common-law privacy.

Next, we note that some of the remaining information may be protected under section 552.117(a)(1) of the Government Code.³ This section excepts from public disclosure the present 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 timely request that such information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Additionally, section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular phone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The college may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the information we have marked in Exhibit 7 belongs to a college employee who made a timely election under section 552.024, it must be withheld under section 552.117. To the extent this information does not belong to a college employee who made a timely election under section 552.024 of the Government Code, it may not be withheld under section 552.117.⁴

Section 552.130 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. We note that section 552.130 does not apply to out-of-state motor vehicle record information. Accordingly, the college must withhold the Texas driver's license information we have marked in Exhibit 7 pursuant to section 552.130 of the Government Code.

We note that the remaining information in Exhibit 5 includes information subject to 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." *Id.* § 552.136. Thus, the college must withhold the bank account information that we have marked in Exhibit 5 under section 552.136 of the Government Code.

³ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴ We note this information contains social security numbers. To the extent this information is not protected under section 552.117, section 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.

Finally, 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 id.* § 552.137(a)-(c). The e-mail addresses that you have marked are not a type specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137 unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, we will allow the trial court to determine whether, and to what extent, the information in Exhibit 8 must be released to the public. The college must continue to rely on our prior ruling in Open Records Letter No. 2007-04354 for the information that was at issue in that request. The college must withhold the submitted W-2 forms pursuant to section 552.101 and federal law. The college must withhold the information you have highlighted in yellow and pink, in addition to the information we have marked, in Exhibit 5 under section 552.101 in conjunction with common-law privacy. To the extent the information we have marked in Exhibit 7 belongs to a college employee who made a timely election under section 552.024, the college must withhold this information under section 552.117. The college must withhold the Texas driver’s license information we have marked in Exhibit 7 pursuant to section 552.130. The college must withhold the bank account information that we have marked in Exhibit 5 under section 552.136. Unless the owners of the e-mail addresses you have marked in Exhibit 7 have affirmatively consented to their release, the college must withhold these addresses under section 552.137. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 297003

Enc. Submitted documents

c: Mr. Frederick J. McCutcheon
Wood, Boykin & Wolter, P.C.
615 North Upper Broadway, Suite 1100
Corpus Christi, Texas 78477
(w/o enclosures)