



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 18, 2008

Mr. Joe Torres, III  
City Attorney  
City of Alice  
216 North Texas Boulevard, Suite 2  
Alice, Texas 78332

OR2008-08403

Dear Mr. Torres:

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# 313406.

The City of Alice (the "city"), which you represent, received a request for the city manager's personnel file, including his employment application or résumé and employment contract. You claim that the submitted personnel records are excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have not submitted any information responsive to the request for the city manager's employment application, résumé, or employment contract. To the extent any information responsive to these aspects of the request existed on the date the city received this request, we assume you have released it. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note that the city has marked responsive portions of the submitted documents in such a manner that it totally obscures the information to the point that we are unable to review it. As a general rule, a governmental body that seeks to withhold information from the public must submit that specific information, or a representative sample of the information, to this office for a ruling under the Act, unless the information is the subject of a previous determination under section 552.301 of the Government Code or there is a law

that allows the information to be redacted.<sup>1</sup> See Gov't Code § 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested" or representative sample); Open Records Decision No. 673 (2001) (previous determinations). The city does not have a previous determination from this office to withhold any of the obscured information. The failure to provide this office with requested information is a violation of section 552.301 because it generally deprives us of the ability to determine whether information may be withheld. See Gov't Code § 552.301(e)(1)(D). In such instances, this office usually has no alternative other than to order that the obscured information be released. However, in this instance, because we can generally discern the nature of the responsive information that has been obscured, being deprived of this information does not inhibit our ability to make a ruling. Therefore, we will address the public availability of this information. In the future, the city should refrain from obscuring responsive information that it submits to this office for the purpose of requesting a ruling under the Act. Failure to submit the required information in a legible form generally results in the legal presumption that the information is public and must be released. See *id.*, .302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 6103(a) of title 26 of the United States Code. 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). 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). The city must withhold the W-4 form we have marked pursuant to federal law.<sup>2</sup>

You claim the remaining personnel records are confidential pursuant to the doctrine of common-law privacy and section 552.102 of the Government Code. Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which

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<sup>1</sup> We note that portions of the obscured information are social security numbers. 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.

<sup>2</sup> As our ruling is dispositive for this information, we need not address your remaining argument against disclosure of some of this information.

would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *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). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

Common-law privacy 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include 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) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review of the remaining personnel records, we find that some of the information, including optional insurance coverage, beneficiary designation, and direct deposit authorization, constitutes personal financial information. We also find that this information is not of legitimate public concern. Thus, the city must withhold the information we have marked in the remaining personnel records under common-law privacy. You have failed to demonstrate, however, how any of the remaining information constitutes highly intimate or embarrassing information. Therefore, no portion of the remaining personnel records may be withheld under common-law privacy.

You assert portions of the remaining information are protected 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 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 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). Pursuant to section 552.117(a)(1), the city must withhold the personal information that pertains to a current or former employee of the city who elected, prior to the city’s receipt of the request for information, to keep such information confidential. You state

that the city manager, whose information is at issue, chose to not allow public access to his personal information. You have not informed us, however, whether the city manager chose to withhold his personal information prior to the city's receipt of the request for information. Therefore, if the city manager timely elected to withhold his personal information, the city must withhold the information we have marked in the remaining personnel records pursuant to section 552.117(a)(1) of the Government Code. If the city manager did not timely elect to withhold his information, then the city may not withhold any of the remaining information under section 552.117(a)(1) of the Government Code.

We note that some of the remaining information is protected by section 552.130, 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[.]"<sup>3</sup> Gov't Code § 552.130(a)(1). Therefore, the city must withhold the Texas driver's license information that we have marked under section 552.130 of the Government Code.

In summary, the city must withhold the W-4 form we have marked under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code, and the information we have marked under common-law privacy. If the city manager timely elected to withhold his personal information, the city must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. The city must withhold the Texas driver's license information that we have marked under section 552.130 of the Government Code. 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). If the governmental body does not file suit over 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

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<sup>3</sup> 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).

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# 313406

Enc. Submitted documents

c: Mr. Michael Cooke  
1000 Corazon  
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(w/o enclosures)