



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2008

Mr. Michael M. Kelly
Assistant Criminal District Attorney
County of Victoria
205 North Bridge Street, Suite #301
Victoria, Texas 77901

OR2008-13196

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# 322671.

The Victoria County District Attorney's Office (the "district attorney") received a request for the personnel files of, and e-mails sent to or received by, two named individuals. You state that the district attorney was not able to recover all of the responsive information because some of it has been deleted. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

We first note that portions of the submitted information, which we have marked, are not responsive to the instant request because they were created after the date the request was received. The district attorney need not release non-responsive information in response to this request and this ruling will not address that information.

¹We 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.

Next, we address your comments regarding e-mails that have been deleted and are no longer maintained by the district attorney. The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You inform us that some of the responsive e-mails have been deleted from the server and are no longer maintained on the district attorney's computer system. Thus, we understand you to contend that to the extent the e-mail messages exist as computer files, they may be recorded on the tape backup system maintained by the district attorney for disaster recovery or data restoration purposes only.

In general, computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed.

As noted, you represent that the district attorney does not "maintain e-mails" in its system. You state that e-mails on office computers are deleted from the server within seven days. We understand you to state that the e-mail messages are not maintained on the hard drive of the computers at issue. Based on your representations, we understand that the locations of the files have been deleted from the FAT system. We therefore believe the e-mail messages were no longer being "maintained" by the district attorney at the time of the request, and are not public information subject to disclosure under the Act. *See Econ. Opportunities Dev. Corp.*, 562 S.W.2d 266; *see also* Gov't Code §§ 552.002, .021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude the Act does not require the district attorney to release the deleted e-mail messages at issue in this instance.

Next, we note that you have redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), .301(e)(1)(D). 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. *See id.* § 552.147. Further, the previous determination issued in Open Records Decision No. 670

(2001) authorizes a governmental body to withhold the home addresses and telephone numbers, personal cellular phone and pager numbers, social security numbers, and family member information of peace officers, as defined by article 2.12 of the Code of Criminal Procedure, under section 552.117(a)(2) without the necessity of requesting a decision from this office. You do not assert, however, nor does our review of our records indicate, that you have been authorized to withhold any of the remaining redacted information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). As such, these types of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of most of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the district attorney should refrain from redacting any information that it submits to this office in seeking an open records ruling. For the redacted information that we are unable to discern, the district attorney has failed to comply with section 552.301, and such information is presumed public under section 552.302. *See* Gov't Code §§ 552.301(1)(D), 302. Thus, we conclude that the district attorney must release the remaining redacted information to the requestor. If you believe that the remaining redacted information is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below.

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 statute. Section 552.101 encompasses section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the submitted I-9 forms under the Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find that the I-9 forms we have marked are confidential under section 552.101 of the Government Code, and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code. The submitted information includes W-4 and tax levy forms. We note that the district attorney received the tax levy forms from the IRS. Prior decisions of this office have held that section 6103(a) 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 days, 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). 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 *id.* § 6103(b)(2). Federal courts have construed the term “return information” expansively to include any information gathered by the IRS 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 that 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)). Accordingly, the district attorney must withhold the submitted W-4 and tax levy forms, which we have marked, pursuant to 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). 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 the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, see Open Records Decision Nos. 440 (1986), 393 (1983), 339(1982). In addition, a compilation of an individual’s criminal history record information is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. Cf. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one’s criminal history). Furthermore, we find that a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. This office has also found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing. See Open Records Decision Nos. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to

financial transaction between individual and governmental body protected under common-law privacy). But this office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We have marked the information that is confidential under common-law privacy. Therefore, the district attorney must withhold this information under section 552.101. But the remaining information either is not highly intimate or embarrassing, or it is of legitimate public interest; therefore, the remaining information is not confidential under common-law privacy, and the district attorney may not withhold it on that ground.

You claim that the responsive e-mails contained in Appendix E and Appendix F are excepted from public disclosure pursuant to section 552.107 of the Government Code. Section 552.107 protects information coming within the attorney-client privilege. Gov't Code § 552.107. 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. 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 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)-(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), meaning it 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).

Upon review, we find that the district attorney has failed to demonstrate how any of the information at issue constitutes confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Therefore, the district attorney may not withhold any of the information in Appendix E or Appendix F under section 552.107 of the Government Code.

You also claim Appendix E and Appendix F are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides, in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(3) it is information relating to a threat against a peace officer or detention officer collected or disseminated under Section 411.048; or

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a), (b). A governmental body claiming subsection 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You have failed to demonstrate the applicability of section 552.108 to the information at issue. Gov't Code § 552.301(e)(1)(A) (governmental body must reasonably explain how and why exception is applicable to the information at issue). Therefore, none of the information may be withheld on that basis.

Section 552.117(a)(2) excepts the current and former home address and telephone number, social security number, and the family member information of a peace officer regardless of whether the officer made an election under section 552.024 of the Government Code or complies with section 552.1175 of the Government Code. In this case, it is unclear whether any of the individuals at issue are licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, if any of the individuals at issue are licensed peace officers as defined by article 2.12, the district attorney must withhold those portions of the records that reveal the officer's home address, home telephone number, family member information, and social security number. The district attorney must also withhold the officer's former home addresses and telephone information from disclosure. *See* Open Records Decision No. 622 (1994).

Even if section 552.117(a)(2) does not apply, some of the remaining information may be excepted from disclosure under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the 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 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 district attorney may only withhold information under section 552.117(a)(1) if the individuals

concerned elected confidentiality under section 552.024 prior to the date on which the request for this information was made. We note that the submitted documents contain section 552.024 election forms for the two named individuals. The submitted election forms only permit an employee to request confidentiality for his or her home address and telephone number. The form provides no means for an employee to request that his or her family member information be withheld from disclosure under section 552.117(a)(1). Thus, the employees at issue did not request confidentiality for their family member information. Therefore, the district attorney may not withhold family member information under section 552.117(a)(1).

We further note that the submitted documents contain the personal information of other district attorney employees and you have not included the election forms documenting that these employees requested confidentiality pursuant to section 552.024. Therefore, we must rule conditionally. Accordingly, if these employees timely elected confidentiality, the district attorney must withhold the employees' personal information under section 552.117(a)(1). The district attorney may not withhold this information under section 552.117(a)(1), however, if the individuals did not make a timely election to keep their information confidential. We have marked the information that may fall within section 552.117(a)(1) or (a)(2).

You also raise section 552.130 of the Government Code. This section 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." Gov't Code § 552.130(a)(1). The district attorney must withhold the information we have marked under section 552.130.

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). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the district attorney must withhold the e-mail addresses we have marked under section 552.137.

Finally, we note that some of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In

making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, under section 552.101 of the Government Code, the district attorney must withhold (1) the I-9 forms in conjunction with section 1324a of title 8 of the United States Code; (2) the W-4 and tax levy forms in conjunction with section 6103(a) of title 26 of the United States Code; and (3) the information we have marked in conjunction with common-law privacy. If any of the individuals at issue is a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, the district attorney must withhold the personal information we have marked pursuant to section 552.117(a)(2) of the Government Code. In regard to the individuals at issue who are not licensed peace officers, the district attorney must withhold only the marked personal information that the individuals specifically elected to keep confidential under section 552.117(a)(1) to the extent that the information pertains to an employee who timely requested confidentiality for the information under section 552.024 of the Government Code. The district attorney must withhold the Texas motor vehicle record information we have marked under section 552.130 and the e-mail addresses we have marked under section 552.137 unless the owners have affirmatively consented to their release. The remaining responsive information must be released, but any copyrighted information may only be released in accordance with copyright law.

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 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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 322671

Enc. Submitted documents

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