



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2009

Mr. Mark Huff
Director of Human Resources
City of White Settlement
214 Meadow Park Drive
White Settlement, Texas 76108

OR2009-08235

Dear Mr. Huff:

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# 345103.

The White Settlement Police Department (the "department") received a request for "the complete personnel file" of a named police officer, including eight specified categories of information. You state that the officer has no disciplinary actions, sustained internal affairs reports, or complaints on file.¹ You also state that you have not submitted evaluations and wage increase documents because you do not believe that this request for information encompasses those types of records. You inform us that some of the requested information has been released. You ask whether other responsive information is excepted from disclosure. We have reviewed the submitted information. We also have considered the comments that we received from the requestor.²

¹We note that the Act does not require a governmental 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).

²See 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 the requestor does not seek access to “social security [numbers], NCIC/TCIC reports, vehicle information, home address/phone [numbers], or family member [information], polygraph test results or medical information.” Therefore, those types of information, which we have marked, are generally not responsive to this request for information. This decision does not address the public availability of any information that is not responsive to this request, and the department need not release such information in response to this request. We also note, however, that the officer’s cell phone, beeper, and pager numbers are responsive to this request to the extent that the department pays for the officer’s cell phone, beeper, and/or pager service. *See* Open Records Decision No. 670 at 6 (2001) (Gov’t Code § 552.117(a)(2) excepts from disclosure peace officer’s cell phone or pager number if officer pays for cell phone or pager service); *but see* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov’t Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials’ and employees’ private vehicles and intended for official business); *see also* Gov’t Code § 552.117(a)(2) (exception for peace officer’s home address and telephone number, social security number, and family member information).

We next note that the department did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov’t Code § 552.301(a). Section 552.301(b) requires the governmental body to ask for the attorney general’s decision and claim its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) requires the governmental body to submit to this office, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body’s claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

We understand that the department received this request for information on or about February 10, 2009. We are informed that the department released responsive information after redacting portions of the records. The department has since requested a decision, by U.S. Mail meter-marked April 13, and has submitted unredacted copies of responsive records. As of the date of this decision, however, the department has neither claimed any

exceptions to disclosure nor provided a copy of the request for information.³ Thus, the department has not complied with section 552.301 of the Government Code in requesting this decision, and therefore all of the submitted information is presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Accordingly, we will determine whether the department must withhold any of the responsive information on either of those grounds.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."⁴ Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Section 1324a of title 8 of the United States Code 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). In this instance, the release of the submitted Form I-9 that we have marked would be "for purposes other than for enforcement" of the applicable federal law. A Form I-9 may only be released for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the department must withhold the marked Form I-9 in its entirety under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 also encompasses section 6103 of title 26 of the United States Code, which 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); see also Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). The submitted W-4 form that we have marked must be withheld in its entirety under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses common-law privacy, which 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). Common-law privacy encompasses certain types of personal financial information. 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

³Our description of the request is based on information that the requestor provided to this office.

⁴Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. See Gov't Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (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). We have marked personal financial information that the department must withhold under section 552.101 and common law privacy.

We note that sections 552.1175, 552.130, 552.136, and 552.137 of the Government Code are or may be applicable to some of the remaining information.⁵ Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b). We have marked information concerning individuals who are identified as police officers employed by a governmental entity other than the department. The department must withhold the marked information under section 552.1175 to the extent that it is related to peace officers who elect to restrict access to the marked information in accordance with section 552.1175(b).

⁵Unlike other exceptions to disclosure under the Act, this office will raise sections 552.1175, 552.130, 552.136, and 552.137 on behalf of a governmental body, because these exceptions are 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).

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state. *See id.* § 552.130(a)(1)-(2). We have marked Texas driver's license information that the department must withhold under section 552.130.

~~Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining "access device"). We have marked bank account numbers that the department must withhold under this exception.~~

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked a personal e-mail address that the department must withhold under section 552.137 unless the owner of the e-mail address has affirmatively consented to its public disclosure.

Lastly, we note that some of the remaining information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See Attorney General Opinion JM-672 (1987)*. An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990)*.

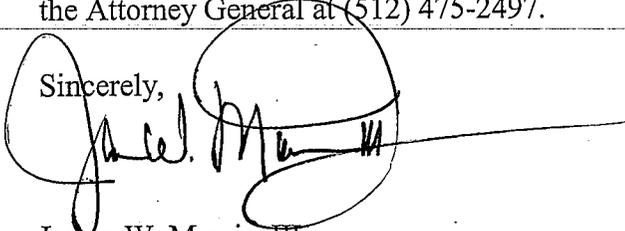
In summary: (1) the marked Form I-9 must be withheld in its entirety under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; (2) the marked W-4 form must be withheld in its entirety under section 552.101 in conjunction with section 6103 of title 26 of the United States Code; (3) the personal financial information that we have marked must be withheld under section 552.101 in conjunction with common-law privacy; (4) the information that we have marked under section 552.1175 of the Government Code must be withheld to the extent that the information is related to peace officers who elect to restrict access to the marked information in accordance with section 552.1175(b); (5) the marked Texas driver's license information must be withheld under section 552.130 of the Government Code; (6) the bank account numbers that we have marked must be withheld under section 552.136 of the Government Code; and (7) the

marked e-mail address must be withheld under section 552.137 of the Government Code unless the owner of the e-mail address has affirmatively consented to its public disclosure. The rest of the responsive information must be released. Any information that is protected by copyright must be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III", is written over a circular stamp. A horizontal line extends from the end of the signature to the right.

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

JWM/cc

Ref: ID# 345103

Enc: Submitted documents

c: Requestor
(w/o enclosures)