



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2009

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2009-11090

Dear Ms. Alexander:

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# 352081.

The Texas Department of Transportation (the "department") received a request for personnel records of a named department employee from May 28, 2006 to the date of the request regarding disciplinary actions, complaints, and any information regarding the employee's military service, as well as e-mails sent to or from the named employee to specified e-mail addresses and an internet domain. You have redacted a social security number pursuant to section 552.147 of the Government Code.¹ You state the department has no information responsive to portions of the request.² You also state you will release some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.102, 552.117, 552.137, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹Section 552.147(b) 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.

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

You state that some of the responsive information exists only as e-mail messages stored on the department's back-up tape system. 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 drive. 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.

You inform us some responsive e-mails have been deleted from the FAT. You state that to restore the information at issue, the department would be required to restore data from the back-up tapes. Based on these representations, we agree that the locations of the computer files at issue have been deleted from the FAT system. We, therefore, find that any e-mail messages at issue that existed only in back-up tapes at the time of the request were no longer being "maintained" by the department 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 at 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 that, in this instance, the Act does not require the department to release any responsive e-mail messages that were stored remotely on the department's back-up tapes on the date of the present request.

Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, *writ ref'd n.r.e.*), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976).

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. *Id.* at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600

(1992) (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). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See Id.* at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure); *see also* Open Decision Nos. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common law privacy), 523 (1989). Upon review, we find the submitted information contains personal financial information that is highly intimate or embarrassing and of no legitimate concern to the public. Therefore, the department must withhold the personal financial information you have marked, in addition to the information we have marked, under section 552.102(a) of the Government Code.

Next, you raise section 552.117(a)(1) of the Government Code for portions of the remaining information. Section 552.117(a)(1) 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. 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 department 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. You state that the individual whose information is at issue elected to keep his personal information confidential prior to the date the department received the current request for information. Thus, the department must withhold the information you have marked under section 552.117(a)(1) of the Government Code.

You also raise section 552.137 of the Government Code for portions of the remaining information. 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* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. You state the owners of the e-mail addresses at issue have not consented to the public disclosure of their e-mail addresses. Therefore, the department must withhold the marked e-mail addresses under section 552.137 of the Government Code.

Finally, you assert that the submitted DD-214 form is excepted from disclosure under section 552.140 of the Government Code. Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with, or that otherwise

first comes into the possession of, a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a), (b). You state that the submitted DD-214 form came into the possession of the department after September 1, 2003. Accordingly, this form must be withheld in its entirety under section 552.140 of the Government Code.

In summary, the department must withhold (1) the personal financial information you have marked, in addition to the information we have marked, under section 552.102(a) of the Government Code, (2) the personal information you have marked under section 552.117(a)(1) of the Government Code, (3) the marked e-mail addresses under section 552.137 of the Government Code, and (4) the DD-214 form under section 552.140 of the Government Code. The remaining information must be released to the requestor.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 352081

Enc. Submitted documents

c: Requestor
(w/o enclosures)