



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2009

Mr. Scott A. Durfee
Assistant General Counsel
Office of the District Attorney
Harris County
1201 Franklin, Suite 600
Houston, Texas 77002-1923

OR2009-13668

Dear Mr. Durfee:

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# 356680.

The Harris County District Attorney's Office (the "district attorney") received a request for the personnel file of a named former Assistant District Attorney. You assert no exceptions to disclosure of this information but indicate that a third party's privacy rights may be implicated by the present request. As of the date of this letter, we have not received any arguments from the interested third party regarding the information at issue. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have reviewed the submitted information.

Initially, we note that the submitted information includes information that is confidential under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ Gov't Code § 552.101. Section 552.101 of the Government Code encompasses criminal history record information ("CHRI") generated by the National Crime

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that state agencies obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information in accordance with chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may only release CHRI to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from the DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-411.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Thus, the district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. *See id.* § 411.083(b)(3).

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, 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 with respect to the determination of the existence, or possible existence, of liability ... for any tax, penalty, interest, fine, forfeiture, or other imposition, 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). Consequently, the district attorney must withhold the submitted W-4 forms pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also 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 form under the Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we find the I-9 form we have marked is 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.

Next, we note that the submitted information also contains fingerprints. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). The district attorney does not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the fingerprints at issue. Therefore, the district attorney must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

We note that a portion of the submitted information is confidential under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 incorporates 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 satisfied. *Id.* at 681-82. The common-law right to privacy also encompasses certain types of personal financial information. This office has determined 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 between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (financial information not excepted from public disclosure by common-law privacy generally includes 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). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (details of employee's enrollment in a group insurance program, the designation of the beneficiary of an employee's retirement benefits, participation in TexFlex, and an employee's authorization of direct deposit of the employee's salary are protected by common-law privacy), 545 at 3-5 (1990) (deferred compensation plan). But where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not private under section 552.101. ORD at 9 (basic facts of group insurance provided by governmental body not protected by common-law privacy). Upon review, we

find portions of the submitted information are highly intimate and of no legitimate public concern. Thus, the district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we note that a portion of the submitted information is confidential under section 552.101 of the Government Code in conjunction with constitutional privacy. Section 552.101 also encompasses information that is made confidential under the constitutional right to privacy. Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

This office has applied privacy to protect certain information about incarcerated individuals. See Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976), as authority, this office held that those individuals who correspond with inmates possess a "first amendment right ... to maintain communication with [the inmate] free of the threat of public exposure." This office ruled that this right would be violated by the release of information that identifies those correspondents because such a release would discourage correspondence. See ORD 185. The information at issue in this ruling was the identities of individuals who had corresponded with inmates. In Open Records Decision No. 185, our office found that "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." *Id.* Implicit in this holding is the fact that an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs which identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORD 430. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. See also ORD 185. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *Id.*; see ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Upon review, we find that the district attorney must withhold the information that reveals inmate visitor information, which we have marked, under section 552.101 in conjunction with constitutional privacy.

We note that some of the remaining information is subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. We have marked the information subject to section 552.117(a)(1). Accordingly, to the extent that the employee to whom this information pertains timely elected confidentiality for this information under section 552.024, the district attorney must withhold the information we have marked under section 552.117(a)(1).²

We note that some of the remaining information is subject to section 552.130 of the Government Code. Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, the district attorney must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, the district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The district attorney must withhold the submitted W-4 forms pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The I-9 form we have marked must be withheld 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. The district attorney must also withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code. The district attorney must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and the information we have marked under section 552.101 in conjunction with constitutional privacy. The district attorney must withhold the information we have marked under section 552.117(a)(1) to the extent that the employee to whom this information pertains timely elected confidentiality for this

²Regardless of the applicability of 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.

information under section 552.024. The district attorney must also withhold the Texas motor vehicle record information 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 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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/eeg

Ref: ID# 356680

Enc. Submitted documents

c: Requestor
(w/o enclosures)