



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 30, 2009

Mr. James E. Tourtelott  
Office of General Counsel  
Texas Higher Education Coordinating Board  
P.O. Box 12788  
Austin, Texas 78711

OR2009-16761

Dear Mr. Tourtelott:

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# 362374.

The Texas Higher Education Coordinating Board (the "board") received two requests from the same requestor for the personnel files of six named individuals, including the requestor, and for the personnel evaluations of two named individuals. You state the board is releasing the requestor's personnel file. You state the board will withhold certain information pursuant to section 552.024 of the Government Code.<sup>1</sup> You also state that board will redact social security numbers from the submitted information pursuant to section 552.147 of the Government Code.<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>Section 552.024 authorizes a governmental body to redact from public release a current or former official's or employee's home address, home telephone number, social security number, and information that reveals whether the person has family members without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. *See* Gov't Code 552.024(a)-(c).

<sup>2</sup>We note that 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.

Initially, we note that the submitted information includes employee performance evaluations subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). The submitted information also contains copies of job descriptions, which are usually open to the public as part of a job posting and subject to section 552.022(a)(15). Section 552.022(a)(15) provides for required disclosure of “information regarded as open to the public under an agency’s policies[.]” *Id.* § 552.022(a)(15). If the board regards the submitted job descriptions as open to the public, then the board must release this information unless it is expressly confidential under other law. Although you seek to withhold the information subject to sections 552.022(a)(1) and (15) under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas, 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the board may not withhold the performance evaluations or the job descriptions, which we have marked, under section 552.103 of the Government Code. However, as section 552.102 is other law for purposes of section 552.022, we will consider your argument under this exception for this information. We will also address your argument under 552.103 for the remaining information that is not subject to 552.022.

Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or

reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has also found that a pending complaint with the Equal Opportunity Employment Commission ("EEOC") indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). We also note that the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You contend the submitted information is excepted under section 552.103 because the board anticipates litigation with the requestor, a former board employee. You state that prior to the receipt of the instant requests for information the board was attempting to negotiate a separation agreement and release of claims with the requestor. You explain that, also prior to the receipt of the instant requests, the requestor responded to the board's proposed separation agreement with a counterproposal, which the board rejected, and that the requestor stated that he intends to file a complaint with the EEOC. We note, however, that as of the dates the board received the instant requests, the requestor had not yet filed a complaint with the EEOC. Furthermore, beyond a general statement that the board anticipates litigation in this instance based on the requestor's counterproposal and his intent to file an EEOC claim, you have failed to demonstrate that the individual at issue has taken any objective steps toward filing litigation against the board as of the dates the board received the requests. Accordingly, we find that you have not established that the board reasonably anticipated litigation when it received the instant requests for information. *See* Gov't Code § 552.103(c). Therefore, the board may not withhold the remaining submitted information under section 552.103 of the Government Code.

The remaining information includes W-4 forms and tax levy forms received from the Internal Revenue Service. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>3</sup> Gov't Code § 552.101. Section 552.101 encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) renders tax return information confidential. *See* 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 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 . . . 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 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 board must withhold the submitted W-4 and tax levy forms we have marked pursuant to federal law.

Next, you claim that portions of the remaining information are confidential pursuant to section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102. 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 test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

if (1) the information contains highly intimate or embarrassing facts, the release 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. *See id.* at 681-82.

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See* 540 S.W.2d at 683. 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). Furthermore, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is 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). We note, however, that generally the public has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern); 542 (1990); 470 at 4 (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the information we have marked is intimate or embarrassing and not of legitimate public concern. Thus, the board must withhold the marked information under section 552.102(a) of the Government Code.

The remaining information contains information subject to sections 552.130, 552.136, and 552.137 of the Government Code.<sup>4</sup> Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1), (2). The board must withhold the information we have marked that relates to a Texas motor vehicle license, title, or registration pursuant to section 552.130 of the Government Code.

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<sup>4</sup>As noted above, the Office of the Attorney General will raise mandatory exceptions like sections 552.130, 552.136, and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions.

Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of this chapter, 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 also* § 552.136(a) (definition of “access device number” includes account numbers). The board must withhold the insurance policy number we have marked pursuant to section 552.136 of the Government Code.

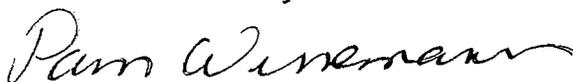
Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Therefore, unless the board receives consent for their release, the board must withhold the marked e-mail addresses pursuant to section 552.137. *See id.* § 552.137(b).

In summary, the board must withhold the W-4 forms and tax levy forms we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The board must withhold the information we have marked under section 552.102 of the Government Code. The board must withhold the information we have marked under sections 552.130, 552.136, and 552.137 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](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,



Pamela Wissemann  
Assistant Attorney General  
Open Records Division

PFW/eb

Ref: ID# 362374

Enc. Submitted documents

c: Requestor  
(w/o enclosures)