



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

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Mr. Michael B. Halla
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OR2011-05795

Dear Mr. Halla:

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# 415549.

The Wilmer Police Department (the "department"), which you represent, received a request for all personnel files and internal affairs investigations pertaining to a named officer. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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. This exception encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) renders tax return information confidential. *See* 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,

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

or other imposition, or offense[.]” 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). Thus, the submitted W-4 form, which we have marked, constitutes tax return information that is confidential under federal law and must be withheld under section 552.101.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (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). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. *Id.* at 683. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found an employee’s voluntary financial choices are highly intimate and embarrassing for purposes of common-law privacy. *See* Open Records Decision Nos. 600 (1992) (personal financial information protected by common-law privacy includes 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). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORD 600 at 9 (information revealing employee participates in group insurance plan funded partly or wholly by governmental body not excepted from disclosure); *see also* Open Records Decision Nos. 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 523 (1989). Whether financial information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

We note the submitted information includes documentation of an investigation of alleged sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *See id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* The *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. If no adequate summary of the investigation exists, then detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, the submitted documents do not include a summary of the investigation. Therefore, the department must generally release the information pertaining to the investigation, except for the identities of the victim and witnesses. The identifying information of the victim and witnesses, which we have marked, must be withheld under section 552.101 in conjunction with common-law privacy under *Ellen*. Furthermore, we find the additional financial information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must also withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing, or it is of legitimate public interest, and the department may not withhold it under section 552.101 on the basis of common-law privacy.

You also claim the submitted information is excepted from disclosure under 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(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The information you seek to withhold under this exception consists of internal affairs investigations. Section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Ellen*, 840 S.W.2d at 525-26 (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). You state two of the four submitted internal affairs investigations “involve the investigating of potential criminal offenses [and], if appropriate, criminal charges will be pursued upon completion of the two investigations.” However, you do not specify which two administrative investigations are related to ongoing criminal investigations. Based on your representation and our review, we conclude section 552.108(a)(1) is applicable to one of the internal affairs investigations, which we have marked. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). However, you do not explain, and we are unable to discern from the submitted documents, how release of any of the remaining administrative information would interfere with the detection, investigation, or prosecution of crime. Thus, we find you have failed to establish the applicability of section 552.108(a)(1) of the Government Code to the remaining information, and the department may not withhold it on that basis.

We further note section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). This subsection refers to the basic front-page information held to be public in *Houston Chronicle* and includes a detailed description of the offense. *See* 531 S.W.2d at 186-88; *see also* Open Records Decision No. 127 (summarizing types of information considered basic information). Thus, with the exception of basic information, the department may withhold the information we have marked under section 552.108(a)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(a)(2); Open Records Decision No. 622 (1994). Portions of the submitted information, which we have marked, pertain to a peace officers who was licensed at the time the information was compiled; however, we are unable to determine from the information provided if the individual is a currently licensed peace officer. Thus, we must rule conditionally. To the extent the individual whose information is at issue is a currently licensed peace officer as defined by article 2.12, the department must withhold the

information we have marked under section 552.117(a)(2) of the Government Code. If the individual is not a currently licensed peace officer, the department may not withhold the information at issue under section 552.117(a)(2).

We note section 552.117(a)(1) may apply to this individual and to another department employee who may not be a licensed peace officer. Section 552.117(a)(1) of the Government Code makes confidential the same types of information covered by section 552.117(a)(2), but for current and former employees of governmental bodies who timely request this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may withhold information under section 552.117(a)(1) on behalf of an employee only if the employee made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Thus, if the employees at issue timely elected to keep their personal information confidential, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The department may not withhold this information under section 552.117(a)(1) if the employees did not make timely elections to keep the information confidential.

Section 552.130 of the Government Code, which 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 [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(1)-(2). Thus, the department must withhold the Texas motor vehicle record information we have marked under section 552.130.²

Section 552.136 of the Government Code states 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). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we find you have failed to demonstrate how any of the information you have marked constitutes an access device number used to obtain money, goods, services, or another thing of value or initiate a transfer of funds other than a transfer originated solely by paper instrument. Therefore, the department may not withhold any of the remaining information under section 552.136 of the Government Code.

²We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, a direct deposit authorization form under section 552.101 of the Government Code in conjunction with common-law privacy, and a Texas driver's license number, a copy of a Texas driver's license, and a Texas license plate number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the department must withhold the W-4 form we have marked under section 552.101 of the Government Code in conjunction with title 26 of the United States Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.102(a) of the Government Code. Except for basic information, the department may withhold the information we have marked under section 552.108(a)(1) of the Government Code. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code, to the extent the individual at issue is a currently licensed peace officer. The department must withhold the personal information of department employees who are not currently licensed peace officers we have marked under section 552.117(a)(1) of the Government Code, if the employees timely elected to keep their personal information confidential. The department must withhold the information we have marked under section 552.130 of the Government Code. The department must release the remaining information.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 415549

Enc. Submitted documents

c: Requestor
(w/o enclosures)