



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 15, 2014

Mr. W. Lee Auvenshine
Assistant Ellis County and District Attorney
109 South Jackson
Waxahachie, Texas 75165

OR2014-06208

Dear Mr. Auvenshine:

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# 519550.

Ellis County (the "county") received a request for the personnel file of a named individual and all written or electronic communications to or from any member of the county commissioner's court pertaining to the appointment or discipline of the county fire marshal during a specified period of time. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.111, 552.117, 552.1175, 552.130, 552.136, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert the information you have marked is not responsive to the request for information because it does not consist of the named individual's personnel file or the specified communications. We note a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Upon review, we find the information at issue consists of communications pertaining to the appointment or discipline of the county fire marshal or consists of attachments to the specified communications, and, thus, is responsive to the instant request. As the county has identified this information and has submitted it to this office for review, we will consider your arguments against the disclosure of all of the submitted information.

Next, we note the submitted information contains peace officers' Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") identification numbers.

In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand an officer's TCLEOSE identification number is a unique computer-generated number assigned to peace officers for identification in the commissioner's electronic database and may be used as an access device number on the TCLEOSE website. Accordingly, we find the officers' TCLEOSE identification numbers in the submitted information do not constitute public information under section 552.002 of the Government Code. Therefore, the TCLEOSE identification numbers are not subject to the Act and need not be released to the requestor.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) of title 26 of the United States Code renders federal 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 Treasury] 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). Thus, the submitted W-4 form, which we have marked, constitutes tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.²

Section 552.101 of the Government Code also encompasses section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and "any information contained in or appended to such form, 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 in this

¹As we are able to make this determination, we need not address your argument against disclosure of this information.

²As our ruling is dispositive for this information, we need not consider your arguments against its disclosure.

instance would be “for purposes other than enforcement” of the referenced federal statutes. Accordingly, we conclude the submitted I-9 form, which we have marked, is confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.³

Section 552.101 of the Government Code also encompasses the Texas Homeland Security Act (the “HSA”). As part of the HSA, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. Section 418.176 provides, in relevant part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]

(2) relates to a tactical plan of the provider[.]

Gov’t Code § 418.176(a)(1)-(2). Section 418.177 provides as follows:

Information is confidential if the information

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may generally be related to emergency preparedness does not make the information per se confidential under the provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). As with any confidentiality statute, a governmental body asserting this section must adequately explain how the responsive information falls within the scope of the provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

³As our ruling is dispositive for this information, we need not consider your arguments against its disclosure.

You assert the information you have marked pertains to the staffing requirements and tactical plan of the county's Fire Marshal's Office and was collected, assembled, or maintained by the county for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. You also assert some of the information you have marked relates to "an assessment conducted by [the county] of the risk or vulnerability of persons or property, including critical infrastructure, to a fire at a public building, which could be the result of an act of terrorism or related criminal activity." Based on your arguments and our review, we find the information we have marked consists of information collected, assembled, or maintained by the county for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and either relates to the staffing requirements of an emergency service provider or relates to the assessment by the county of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. Thus, this information falls within the scope of sections 418.176 and 418.177 and the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code.⁴ However, we find you failed to establish how any of the remaining information you have marked relates to the staffing requirements or tactical plan of an emergency response provider for the purposes of section 418.176, or relates to an assessment of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity for purposes of section 418.177. Thus, the county may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with either section 418.176 or section 418.177 of the Government Code.

Section 552.101 of the Government Code also encompasses chapter 352 of the Local Government Code. Subchapter B of chapter 352 pertains to the powers and duties of county fire marshals. The subchapter provides that the marshal shall investigate the cause, origin, and circumstances of fires that destroy property within the marshal's jurisdiction. Local Gov't Code § 352.013. In certain cases, such as where arson is suspected, the marshal may determine that further investigation is necessary and, in such cases, is granted subpoena powers and the authority to administer oaths and gather and preserve evidence. *Id.* § 352.015.

You assert the information you have marked is made confidential under section 352.017 of the Local Government Code. Section 352.017, in relevant part, provides:

- (a) In a proceeding under this subchapter, the county fire marshal may:
 - (1) conduct an investigation or examination in private;
 - (2) exclude a person who is not under examination; and

⁴As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

- (3) separate witnesses from each other until each witness is examined.

Id. § 352.017(a). We understand you to argue, relying on *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977), that this provision makes the information at issue confidential. In *Pruitt*, the Texas Supreme Court interpreted the statutory predecessor to subchapter B of Chapter 352 of the Local Government Code. The court held the legislature's intent was "to allow public access to [certain basic information, but not] to allow access to *active* investigatory records of the county fire marshal." 551 S.W.2d at 710 (emphasis added). The court further concluded the purpose of the statute was to preclude interference with the fire marshal's law enforcement duties. *Id.* Unlike the situation in *Pruitt*, we have no indication the information at issue pertains to an active investigation or that release of the information would interfere with law enforcement. As such, we find you have failed to demonstrate the applicability of section 352.017. Accordingly, we conclude the information at issue may not be withheld under section 552.101 of the Government Code in conjunction with subchapter B of Chapter 352 of the Local Government Code and the holding in *Pruitt*.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600, 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision Nos. 600 (designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *See* ORD 545. Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁵ However, we find you have not demonstrated how the remaining information you have marked is highly intimate or embarrassing and not of legitimate public concern. Thus,

⁵As our ruling is dispositive for this information, we need not consider your remaining arguments against its disclosure.

the remaining information may not be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code 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 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.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we agree the county must withhold the date of birth you have marked under section 552.102(a) of the Government Code. However, we find none of the remaining information you have marked is subject to section 552.102(a) of the Government Code, and the county may not withhold any of the remaining information on that basis.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You inform us the information you have marked consists of communications involving county employees regarding the decision making processes related to fire inspections and emergency responses within the county. You assert release of the information at issue would inhibit free discussion between the county judge and the county fire marshal and emergency coordinator in regard to important policy issues affecting public safety. Based on your representations and our review of the information at issue, we find the county has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the county. Thus, the county may withhold the information we have marked under section 552.111 of the Government Code. Upon review, however, we find the remaining information you have marked is either general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have failed to show how the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the county. Accordingly, the remaining information you have marked may not be withheld under section 552.111 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Accordingly, the county must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(2) of the Government Code.⁶ However, the marked cellular telephone number may only be withheld if a governmental body does not pay for the cellular telephone service.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). Some of the remaining information relates to peace officers and is not held by the county in an employment capacity. Accordingly, if the individuals at issue elect to restrict access to

⁶We note a governmental body may withhold a peace officer's home address and telephone number, personal cellular telephone and pager numbers, social security number, and family member information under section 552.117(a)(2) without requesting a decision from this office. *See* Open Records Decision No. 670 (2001). As our ruling is dispositive for this information, we need not consider your remaining argument against its disclosure.

their information in accordance with section 552.1175(b), then the county must withhold the marked information under section 552.1175 of the Government Code. Conversely, if the individuals at issue do not elect to restrict access to their information in accordance with section 552.1175(b), then the marked information may not be withheld under section 552.1175. In any event, we find you have failed to demonstrate the remaining information you have marked is subject to section 552.1175, and it may not be withheld on that basis.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130(a). Upon review, we find you have failed to demonstrate the remaining information you have marked is subject to section 552.130, and the county may not withhold it on that basis.

Section 552.136 of the Government Code provides, “[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”). Accordingly, the county must withhold the routing and bank account numbers we have marked under section 552.136 of the Government Code.⁷ However, we find the remaining information you have marked is not subject to section 552.136 of the Government code, and it may not be withheld on that basis.

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). *See id.* § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the county must withhold the personal e-mail address you have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.⁸

In summary, the TCLEOSE identification numbers in the submitted information are not subject to the Act and need not be released to the requestor. The county must withhold (1) the information 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; (2) the information we have marked under section 552.101 of the Government Code in conjunction with

⁷Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See Gov't Code* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

⁸We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

section 1324a of title 8 of the United States Code; (3) the information we have marked under section 552.101 of the Government Code in conjunction with sections 418.176 and 418.177 of the Government Code; (4) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (5) the date of birth you have marked under section 552.102(a) of the Government Code. The county may withhold the information we have marked under section 552.111 of the Government Code. The county must also withhold (1) the information you have marked, and the additional information we have marked, under section 552.117(a)(2) of the Government Code, but may only withhold the marked cellular telephone number if a governmental body does not pay for the cellular telephone service; (2) the information we have marked under section 552.1175 of the Government Code, if the individuals at issue timely elected to restrict access to their information in accordance with section 552.1175(b) of the Government Code; (3) the bank account and routing numbers we have marked under section 552.136 of the Government Code; and (4) the e-mail address you have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The county must release the remaining information that is subject to the Act.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/bhf

Ref: ID# 519550

Enc. Submitted documents

c: Requestor
(w/o enclosures)