



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 11, 2016

Mr. Jonathan L. Almanza
Assistant District Attorney
Criminal District Attorney's Office
Hidalgo County
100 North Clossner, Room 303
Edinburg, Texas 78539

OR2016-18153

Dear Mr. Almanza:

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# 622433 (File No. 2016-0065-DA.CO).

The Hidalgo County Public Affairs Office (the "county") received a request for the personnel file of a named individual. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample of information.¹

Initially, we note you have redacted portions of the submitted information, but have not explained why or by what authority you have redacted this information. Some of the redacted information includes the named individual's social security number, home address, and home phone number. We presume you have redacted this information under section 552.117(a)(1) of the Government Code as permitted by section 552.024(c) of the

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

Government Code.² However, you do not assert, nor does our review of the records indicate, you have been authorized to withhold the remaining redacted information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Therefore, this information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the county should refrain from redacting any information that it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses federal law. The submitted information contains a W-4 tax form. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Attorney General Op. MW-372 (1981). Employee W-4 tax forms are excepted from disclosure by section 6103(a). Open Records Decision No. 600 (1992). Accordingly, the county must withhold the submitted W-4 tax form, which 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.

Section 552.101 of the Government Code also encompasses section 412.0128 of the Labor Code, which provides that "[i]nformation in or derived from a workers' compensation claim file regarding an employee . . . is confidential . . . and may not be disclosed by [the State Office of Risk Management ("SORM")] except as provided by . . . this subchapter, or other law." Labor Code § 412.0128. We note the language of section 412.0128 is substantially identical to section 402.083 of the Labor Code, which provides that "[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the [Division of Workers' Compensation of the Texas Department of Insurance (the "division")] except as provided by this subtitle or other law." *Id.* § 402.083(a). In Open Records Decision No. 533(1989), this office construed the predecessor to section 402.083(a) to apply only to information the governmental body obtained from the Industrial Accident Board, subsequently the Texas Workers' Compensation Commission, and now the division. *See* Open Records Decision No. 533 at 3-6 (1989); *see also* Labor Code § 402.086 (transferring confidentiality conferred by section 402.083(a) of the Labor Code to information other parties obtain from division files). Accordingly, for purposes of section 402.083(a), information that was not obtained from the division may not be withheld

²Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). If a governmental body redacts such information, it must notify the requestor in accordance with subsections 552.024(c-1) and (c-2). *See id.* § 552.024(c-1)-(c-2).

on that basis. Based on this analysis, we find information in the possession of the county that was not obtained from SORM may not be withheld on the basis of section 412.0128. Further, this office has interpreted section 402.083 to protect only that “information in or derived from a claim file that explicitly or implicitly discloses the identity of employees who file workers’ compensation claims.” Open Records Decision No. 619 at 10 (1993). Prior decisions of this office have found that information revealing the date of injury, as well as an injured employee’s name, beneficiary name, claim number, social security number, home telephone number, home address, and date of birth implicitly or explicitly identifies a workers’ compensation claimant and is therefore confidential under section 402.083. Only in those cases where release of the employer’s identity would reveal the claimant’s identity may the identity of an employer be withheld. We will apply the same analysis in applying section 412.0128 to the information at issue.

We understand SORM administers the workers’ compensation insurance program for state employees. See Labor Code § 412.011(a), (b)(7). You state the information marked Exhibit E pertains to a worker’s compensation claim of a state employee. See *id.* § 501.001(5). However, you do not state whether the information at issue was obtained by the county from SORM. Because we are unable to determine whether the information at issue was obtained from SORM, we must rule conditionally. To the extent the information at issue was obtained by the county from SORM, the county must withhold any information that explicitly or implicitly identifies a workers’ compensation claimant, including the claimant’s date of injury, name, beneficiary name, claim number, social security number, home telephone number, home address, and date of birth, under section 552.101 of the Government Code in conjunction with section 412.0128 of the Labor Code. Cf. *id.* § 402.083; ORD 619 at 10. However, if this information was not obtained by the county from SORM, then the county may not withhold this information under section 552.101 of the Government Code in conjunction with section 412.0128 of the Labor Code.

Section 552.101 of the Government Code also encompasses common-law privacy. Common-law privacy 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. Texas 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 established. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Additionally, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally private. See Open Records Decision Nos. 600 (employee’s designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, 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), 523 (1989) (common-law privacy protects credit

reports, financial statements, and other personal financial information), 455 at 9 (employment applicant's salary information not private), 423 at 2 (1984) (scope of public employee privacy is narrow). We also note the public generally 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 (1987) (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). In Open Records Decision No. 470 (1987), this office determined that, although the fact that a public employee is sick is public, specific information about illnesses is excepted from disclosure under common-law privacy. ORD 470 at 4; *see* ORD 455 at 9 (1987) (information regarding applicants' illnesses or operations and physical handicaps is intimate personal information). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the county must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the county has failed to demonstrate the remaining information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the county may not withhold the remaining information at issue under section 552.101 of the Government Code 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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. Of Tex.*, 354 S.W.3d 336 (Tex. 2001). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find the county must withhold the date of birth you have redacted and we have marked under section 552.102(a) of the Government Code. However, we find no portion of the remaining information 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.

We note some of the remaining information may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a

governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). 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 be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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 employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information you redacted and the information we marked under section 552.117(a)(1) of the Government Code; however, the county may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, the county may not withhold the information under section 552.117(a)(1).

In summary, the county must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. To the extent the information at issue was obtained by the county from SORM, the county must withhold any information that explicitly or implicitly identifies a workers' compensation claimant under section 552.101 of the Government Code in conjunction with section 412.0128 of the Labor Code. However, if this information was not obtained by the county from SORM, then the county may not withhold this information under section 552.101 in conjunction with section 412.0128 of the Labor Code. The county must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The county must withhold the information you redacted and the information we marked under section 552.102(a) of the Government Code. To the extent the employee at issue timely requested confidentiality under section 552.024, the county must withhold the information you redacted and the information we marked under section 552.117(a)(1) of the Government Code; however, the county may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. The county 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.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,

A handwritten signature in black ink, appearing to read "Ashley Crutchfield". The signature is written in a cursive, flowing style.

Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/dls

Ref: ID# 622433

Enc. Submitted documents

c: Requestor
(w/o enclosures)