



Office of the Attorney General

State of Texas

December 19, 1996

DAN MORALES
ATTORNEY GENERAL

Ms. Mary Barrow Nichols
General Counsel
Texas Workers' Compensation Insurance Fund
221 W. 6th Street, Suite 300
Austin, Texas 78701

OR96-2450

Dear Ms. Nichols:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102486.

The Texas Workers' Compensation Insurance Fund (the "Fund") received two open records requests, from the same law firm, for a variety of information related to the Fund. You explain that "[s]ome of the requested information will be made available to the requestor; however, it is the Fund's position that some of the requested information is excepted from disclosure under . . . §§ 552.101, 552.102 and 552.107, and TEX. INS. CODE ANN. art. 5.76-4(f) (Vernon Supp. 1996)."¹ In your letter to this office, by reference to Open Records Decision No. 551 (1990), you also raise section 552.103 of the Government Code. We have considered the exceptions you have claimed and have reviewed the information at issue.²

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. Although section 552.103(a)

¹We note, that since the time of your original request for a ruling from this office, you have submitted further correspondence stating that "the Fund is now withdrawing its request for an opinion with respect to [the section 552.107 and TEX. INS. CODE ANN. art. 5.76-4(f)] exceptions," because you have not found any documents protected by these previously raised exceptions. Therefore, in this ruling we will not address the exceptions which you have withdrawn from consideration.

²You also assert that the Fund has been unable to locate certain information responsive to the request. We note that chapter 552 does not apply to information that does not exist. See Open Records Decision No. 555 (1990). The Fund should, however, make a *good-faith* effort to relate the open records request to information in the Fund's possession. Open Records Decision No. 87 (1975). We assume that you have advised the requestor that certain information does not exist.

gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 (1990) at 5, 511 (1988) at 3.

The Fund has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The Fund must meet both prongs of this test for information to be excepted under section 552.103(a).

We conclude that the Fund has not met its burden of establishing that section 552.103 applies to the submitted information. The Fund refers to "a case currently in litigation" without any explanation. We are unable to determine whether the Fund is a party to any pending litigation with this information. Moreover, we are unable to determine that the submitted information is related to any pending or reasonably anticipated litigation. *See* Open Records Decision No. 638 (1996). Therefore, the Fund may not withhold the submitted information under section 552.103 of the Government Code.

You also assert that the submitted records are excepted from disclosure pursuant to sections 552.101 and 552.102 of the Government Code. Therefore, we must consider whether these exceptions except from disclosure any of the information, which you may not withhold pursuant to section 552.103. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

Some of the submitted information is confidential by statute. Included in the submitted records is a copy of Form W-4, titled Employee's Withholding Allowance Certificate, of the Internal Revenue Service, which has been completed by an employee of the Fund. A W-4 form is confidential as a matter of law by title 26, section 6103(a), of the United States Code. *See* 26 U.S.C. § 6103(a); Open Records Decision No. 600 (1992) at 8-9 (concluding that employee W-4 forms are excepted from public disclosure by 26 U.S.C. § 6103(a)). Accordingly, you must withhold the W-4 form under section 552.101 of the Government Code.

The social security numbers contained in the requested personnel files may be confidential by federal law and therefore excepted from disclosure under section 552.101. Amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), incorporated into the Open Records Act by section 552.101, make confidential social security numbers obtained or maintained by authorized persons pursuant to any provision of law enacted *on or after October 1, 1990*. Open Records Decision No. 622 (1994) at 2-3. Thus, if social security numbers found in the requested information were obtained or maintained pursuant to any such provision of law, the numbers are confidential and may not be publicly disclosed.

We now address your assertion that section 552.102 protects some of the submitted information. The test to be applied to information claimed to be protected under section 552.102 of the Government Code is the same test formulated by the Texas Supreme Court in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. See *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

After reviewing the submitted information, we do not find any information that is protected by privacy. We do not believe that any of the submitted information concerns a person's private affairs, but rather a person's employment by a public entity subject to the Open Records Act. Accordingly, we conclude that section 552.102 is inapplicable to the remaining information. See Open Records Decision No. 444 (1986).

Certain other information must be withheld under sections 552.117 and 552.024 of the Government Code. Sections 552.024(a) and 552.117(1) provide that current or former public employees may elect to keep private their home addresses, home telephone numbers, social security numbers, and family member information. Therefore, if the Fund's employee has made the election under section 552.024 of the Government Code to keep that information confidential, section 552.117 requires that the Fund redact that information prior to releasing other information. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the home address, telephone number, social security number, or family information of an official or employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5. The submitted files contain no notice pursuant to section 552.024 that the employee, whose records you have submitted, wishes his home address and telephone numbers withheld. If notice was not provided prior to this open records request, the information must be released, unless any social security number is protected from disclosure by federal law as described above.

In summary, except as noted above, the submitted documents must be released.³ We are resolving this matter with an informal letter ruling rather than with a published

³We have marked those types of information that must be withheld under section 552.101. Except as noted, you may not withhold information under sections 552.101. Please note, however, that we did not mark for withholding information that may be excepted from disclosure under section 552.117 of the Government Code or social security numbers that may be protected by federal law. If such information is indeed confidential under those provisions, you must withhold that information wherever it occurs in the personnel files.

open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/ch

Ref.: ID# 102486

Enclosures: Submitted documents

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