



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 26, 1998

Ms. Dawn D. Eisenhauer
Personnel Director/P.I.O.
City of Watauga
7101 Whitley Road
Watauga, Texas 79493

OR98-1550

Dear Ms. Eisenhauer:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 116119.

The City of Watauga (the "city") received several requests for various categories of information concerning the Watauga Code Enforcement Officers, Watauga Parks Development Corporation, and city employees and records. In response to the request, you submitted to this office for review a representative sample of the information — the personnel file of one individual -- which you assert is responsive.¹ You state that "[t]he City Secretary's office has responded to all of the inquiries except the request to view original information in employee's Personnel files." You have submitted the remaining requested information at issue and ask whether any of the information may be withheld under the act. We have considered the arguments you raise and reviewed the documents at issue.²

Because giving actual physical access to the original documents could reveal confidential information, the city asks whether original documents must be provided to the requestor. Open Records Decision No. 512 (1988), 465 (1987). This office has ruled that

¹We assume that 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)(where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.

²In its brief to this office, the city asks specific factual questions regarding the requested information. This office is unable to resolve questions of fact through the opinion process. Open Records Decision Nos. 554 (1990), 552 (1990).

if giving actual physical access to records would reveal confidential information, that option must be denied. *See id.* Therefore, in those instances where confidential information exists in the requested records, the city may provide the requestor with redacted *copies* of the information.

Although you have not specifically raised section 552.101 as an applicable exception, we note that some information revealed in the submitted records, may be excepted from required public disclosure under this section. The Office of the Attorney General will raise section 552.101 on behalf of a governmental body when necessary to protect third-party interests. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

We first address whether the submitted records are subject to the common-law right of privacy. Section 552.101 encompasses the common-law right to privacy. Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test to determine whether information is private and excepted from disclosure under common-law privacy provisions, which are encompassed in section 552.101 and section 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Tex. Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

The records at issue relate to the job performance and work behavior of a public employee. Because there is a legitimate public interest in the activities of public employees in the workplace, information about public employees is commonly held not to be excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 (1984) at 2 (scope of public employee privacy is narrow). This office has concluded in the past that common-law privacy does not protect information about the educational training of an applicant or employee; names and addresses of former employers; dates of employment, kind of work, salary, and reasons for leaving; names, occupations, addresses and telephone numbers of character references; and information about job performance. Open Records Decision No. 455 (1987) at 9. Thus, to the extent the submitted information relates to a public employee's job performance, we conclude that the public has a legitimate right to this information.

On the other hand, common-law privacy generally protects information about an individual's overall financial status and financial history. Open Records Decision No. 373 (1983) at 3 (background financial information is type of intimate information generally protected under common-law privacy). We have previously determined that information revealing the designation of beneficiaries of insurance and retirement funds is confidential under the right of privacy. Open Records Decision No. 600 (1992) at 10. Consequently,

information about an individual's overall financial status and financial history contained in the requested documents is excepted from required public disclosure under sections 552.101 and 552.102. *Id.* However, information revealing that an employee participates in a group insurance plan funded by the city or state or has enrolled persons in addition to himself is not excepted from disclosure. *Id.* But, information relating to the employee's choice of carrier and his election of optional coverages is excepted from disclosure. *Id.* Thus, a public employee's allocation of his salary to a voluntary investment program offered by their employer is a personal investment decision, and information about it is excepted from disclosure by a common-law right of privacy. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1990) (deferred compensation plan).

Specifically, the city must withhold the following types of information pursuant to section 552.102(a): information revealing personal financial information or personal financial decisions, including beneficiary information, federal income tax information, and information pertaining to life and health insurance coverage. *See* Open Records Decision No. 600 (1992) and authorities cited therein. For example, this office has held that an employee's participation in the Texas Municipal Retirement System or in a group insurance plan funded by the governmental body is not excepted from disclosure under common-law privacy. Open Records Decision No. 600 (1992) at 9-10, 480 (1987). Having reviewed the records at issue, we have marked the information which is protected from disclosure by the common-law right to privacy pursuant to sections 552.101 or 552.102. The remaining information which is not marked must be disclosed.

Section 552.101 also encompasses information protected by statutes. Specifically, the annual statements pertaining to participation in the Texas Municipal Retirement System are made confidential under section 855.115 of the Government Code and may not be released in this instance.

Other submitted information must also be withheld under federal law. Form W-4, the Employee's Withholding Allowance Certificate, is confidential as tax return information under title 26, section 6103(a) of the United States Code. Open Records Decision No. 600 (1992) at 8-9. We further note that one of the documents you submitted to this office is a "Request for Employment Verification." This form is governed by title 42, section 1471 et. seq. of the United States Code, which provides that the form "will not be disclosed outside the [U.S. Department of Housing and Urban Development]." Accordingly, we conclude that the completed "Request for Employment Verification" is confidential under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations.

The city submitted certain criminal history record information which was obtained in the application process. We note that federal regulations prohibit the release of criminal history record information ("CHRI") maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of

criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, to the extent that the requested information contains CHRI obtained from DPS or another criminal justice agency, you must not release such information to the requestor.

We also observe that the records at issue include information that may be confidential pursuant to sections 552.024 and 552.117 of the Government Code.³ Sections 552.024 and 552.117 provide that a current or former public employee or official can opt to keep private his or her home address, home telephone number, social security number, and information that reveals that the individual has family members. You must withhold this information if, as of the time of the request for the information, the named individual had elected to keep this information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987). In this instance, the employee, whose personnel records you have submitted, has elected to keep this information confidential; therefore, we have marked the information which must be withheld under section 552.117.⁴ However, as you have submitted a representative sample, we note that the city may not withhold this information if the respective employee made the request for confidentiality under section 552.024 after the city received the current request for information. *See* Open Records Decision No. 530 (1989) at 5.

Finally, we note that the Seventy-fifth Legislature added section 552.130 to the Open Records Act which governs the release and use of information obtained from motor vehicle records.⁵ Section 552.130 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if the information relates to:

³Although the attorney general will not ordinarily raise an exception that the governmental body has failed to claim, *see* Open Records Decision No. 325 (1982) at 1, we will raise section 552.117 of the Government Code.

⁴We also note that if an individual’s social security number was obtained or maintained by a governmental body pursuant to any provision of law, enacted on or after October 1, 1990, it is confidential pursuant to section 405(c)(2)(C)(viii) of title 42 of the United States Code.

⁵Because the purpose of section 552.130(a) is to protect the privacy of individuals, this office views this exception to disclosure as a mandatory one. In other words, a governmental body may not waive the exception outlined in section 552.130(a).

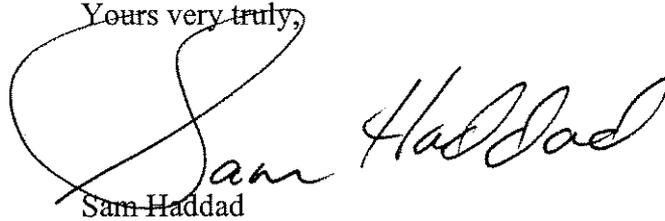
(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Therefore, you must withhold the driver's license numbers from the requested records pursuant to section 552.130.

We are resolving this matter with an informal letter ruling rather than with a published 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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 116119

Enclosures: Marked documents

cc: Mr. Dennis M. Nelson
6621 Mona Lisa
Watauga, Texas 76148
(w/o enclosures)