



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 20, 1998

Mr. Helmut Talton  
Associate General Counsel  
Texas Department of Transportation  
125 E. 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR98-2455

Dear Mr. Talton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118680.

The Texas Department of Transportation (the "department") received a request for information relating to Ms. Cheryl Liano. You contend that some of the requested information from Ms. Liano's personnel file is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed a representative of the information at issue.<sup>1</sup>

Ms. Liano made the original request to the department for the information that is at issue. Apparently acting on Ms. Liano's behalf, Mr. William Mischen responded to the department's request for clarification of the original request. Your correspondence with Mr. Mischen indicates that you are not satisfied that he is acting as Ms. Liano's authorized representative. You perceive Mr. Mischen as the requestor, and you believe that his request should be treated as one from a member of the general public. Therefore, we will address your arguments against disclosure as they relate to release of the information to the general public. We note, however, that none of your arguments against disclosure would allow you to withhold the information at issue from Ms. Liano or Ms. Liano's authorized representative. *See Gov't Code § 552.023* (information cannot be withheld from individual

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<sup>1</sup>We 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)*. 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.

or individual's authorized representative based on laws intended to protect individual's privacy interests).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 excepts information in personnel files only if it meets the test articulated under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Indus. Accident Brd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

The information at issue includes a variety of financial information that you contend is excepted from disclosure. This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 545 (1990), 523 (1989). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Therefore, the fact that an employee participates in a group insurance plan funded by the state is not information that is excepted from disclosure. Open Records Decision No. 600 at 9 (1992). Financial information relating to retirement benefits must be disclosed if it reflects an employee's mandatory contributions to a state retirement system. *Id.* at 9-10. On the other hand, information is excepted from disclosure if it relates to a voluntary investment that an employee made in an optional benefits plan offered by the town or state. *Id.* In addition, information relating to an employee's choice of insurance carrier and his election of optional coverages is confidential under the right of privacy, as is information revealing an employee's designation of beneficiaries of insurance and retirement funds. *Id.* at 10-11. Finally, financial information of a purely personal nature, such as information relating to mortgage loans and bank accounts, is protected by common-law privacy and must not be released. *Id.* at 11-12.

We have reviewed your privacy markings and generally agree with your markings except to the extent that you have marked information about mandatory contributions to the state retirement system and the amount of net pay. We note also that Ms. Liano's educational transcripts are not protected by the common-law right to privacy. Open Records Decision No. 467 (1987) (public has legitimate interest in job qualifications, including college transcripts, of public employees).

Section 552.101 also encompasses confidentiality statutes. Two classes of information contained in the submitted documents are confidential by statute. Prior decisions of this office have held that title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). It also appears that some of the submitted information is protected from disclosure pursuant to the provisions of Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c).

Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The submitted records indicate that Ms. Liano elected under section 552.024 to keep her home address, home telephone number, social security number, and family member information confidential. She made the election prior to the date on which the department received the request for her personnel file. Therefore, the department must withhold Ms. Liano's home address, home telephone number, social security number, and family member information from disclosure to the general public under section 552.117.<sup>2</sup>

Finally, you contend that one of the submitted documents is excepted from disclosure under section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(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[.]

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<sup>2</sup>A social security number is also excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, § 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994).

We agree that the document from Texas Department of Safety relating to Ms. Liano's drivers license is excepted from disclosure under 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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 118680

Enclosures: Submitted documents

cc: Mr. William Mischen, Jr.  
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(w/o enclosures)