



April 12, 2000

Ms. Elizabeth Lutton  
Senior Attorney  
City of Arlington  
Mail Stop 03-0100  
501 West Main Street  
Arlington, Texas 76010

OR2000-1431

Dear Ms. Lutton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133980.

The City of Arlington (the “city”) received a request for information pertaining to three specific individuals who are or were part of the city’s Engineering Services personnel. Specifically, the requestor seeks “all personnel files, including disciplinary actions and criminal records, along with any records of payment (other than payroll checks).” You state that the city intends to make much of the requested information available to the requestor.<sup>1</sup> However, you claim that the remainder of the requested information is excepted from required public disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the information at issue.<sup>2</sup>

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<sup>1</sup>You state that you will provide the requestor with this portion of the requested materials upon payment by the requestor of copying charges.

<sup>2</sup>In reaching our conclusion here, 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.

We begin by addressing your argument regarding section 552.117 of the Government Code. Section 552.117 of the Government Code excepts from required public disclosure information that reveals a public employee's home address, telephone number, social security number, or whether the public employee has family members, but only if the public employee has requested that this information be kept confidential under section 552.024. You note that the requestor specifically excludes from the request "all personal identification such as personal addresses and phone numbers, etc., contained within these files." Accordingly, you state that the city does not intend to release the individuals' home addresses and phone numbers. However, you point out that the requestor does not necessarily exclude social security numbers or family member information from the scope of his request. Accordingly, you argue that the city must withhold this type of information from the responsive documents, represented by the submitted sample in Exhibit 2, under section 552.117.

However, section 552.117 requires a governmental body to withhold this type of information only when an employee requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). Moreover, a governmental body may not withhold the information of a current or former 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 that information is made. Open Records Decision No. 530 at 5 (1989). Accordingly, the city must withhold the social security numbers of the three city employees as well as any information that reveals whether these employees have family members only for those employees who elected confidentiality under section 552.024 prior to the date that the request for information was made.<sup>3</sup>

If the employees have not made timely elections pursuant to section 552.024 to keep their section 552.117 information confidential, their social security numbers and those of any non-employees may nevertheless be confidential under section 552.101 of the Government Code in conjunction with federal law. Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. Accordingly, section 552.101 encompasses confidentiality provisions such as the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). This provision makes confidential social security numbers and related records that have been obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* In this case, it is not

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<sup>3</sup>We note that family member information and employees' social security numbers appear throughout the submitted information, and are not limited to Exhibit 2. Therefore, our ruling regarding section 552.117 applies to all of the requested information and is not limited to the information represented by Exhibit 2. Moreover, if section 552.117 applies, then it covers forms and other documents indicating the extension of employment benefits to family members as such information reveals the existence of family members.

apparent to us that the social security numbers contained in the requested information have been obtained or maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the city to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I). We caution you, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Gov't Code § 552.352. Prior to releasing the social security numbers, the city should ensure that these numbers have not been obtained or maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Next, we address the responsive financial information represented by Exhibit 3. Section 552.101 also encompasses common law privacy. Information is confidential under common law privacy (1) if the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) if the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Therefore, the fact that an employee participates in a group insurance plan funded by a governmental employer and the amount of any consequent payroll deduction is not information that is excepted from disclosure. Open Records Decision No. 600 at 9 (1992). On the other hand, information relating to an employee's choice of insurance carrier and his election of optional coverages is confidential under the common law right of privacy. *Id.* at 10-11. Similarly, this office has determined that information revealing the personal financial decision to have certain deductions made from an employee's paycheck meets the *Industrial Foundation* test. Open Records Decision No. 545 (1990).

Therefore, the information regarding choice of beneficiary, paycheck deductions, as well as information revealing an employee's decision to contribute to organizations such as the United Way, is protected by common law privacy as encompassed by section 552.101. *See* Open Records Decision No. 600 at 10 (1992). We have marked the types of information in the documents submitted as Exhibit 3 that the city must withhold under section 552.101.<sup>4</sup> The city must release the rest of the responsive financial information.

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<sup>4</sup>One beneficiary designation form was actually submitted as Exhibit 2 as a representative sample of information that may be confidential under section 552.117. However, while we are unable to determine whether this form is confidential under section 552.117 as explained above, we find that it contains the type of financial information that is confidential under section 552.101 in conjunction with common law privacy.

The requested information also contains federal tax forms, a sample of which you have submitted as Exhibit 4. 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). Thus, the city must withhold any tax forms from disclosure under section 552.101 as information deemed confidential by federal statute.

Next, the requested information contains criminal history information. You explain that the documents submitted as Exhibit 5 consist of all the information that the city has so far located pursuant to the requestor's request for "criminal records" regarding the three named individuals. As explained above, section 552.101 encompasses common law privacy. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In this instance, because the requestor asks for all criminal records of certain named individuals, we believe that these individuals' privacy rights have been implicated. Thus, to the extent that the city has records responsive to the request in which any of the named individuals are possible suspects, the city must withhold this information under section 552.101. *See id.* Accordingly, the city must withhold Exhibit 5.<sup>5</sup>

Finally, we address the insurance form you have submitted as Exhibit 6 which you argue contains medical information that is protected by common law privacy. Certain medical conditions are protected by common law privacy as encompassed by section 552.101. Open Records Decision Nos. 343 (1982), 262 (1980). We find that the insurance form does contain private medical information which the city must withhold under section 552.101 in conjunction with common law privacy. We have marked the information that the city must withhold.

In conclusion, the city must withhold any information that reveals the three named individuals' home addresses, home phone numbers, social security numbers, and whether they have family members under section 552.117 if the individuals timely elected for such confidentiality pursuant to section 552.024. The social security numbers of city employees who have not elected under section 552.024, and any social security numbers of non-employees may possibly be confidential under the federal Social Security Act as

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<sup>5</sup>You also state that in addition to the records contained in Exhibit 5, the city may also have access to online records such as the NCIC and TCIC systems. If the responsive information in the possession of the city consists of NCIC or TCIC records, the city must withhold those records under chapter 411 of the Government Code as encompassed by section 552.101. *See Gov't Code* §§ 411.083, 411.089(b)(1).

encompassed by section 552.101. Some of the requested financial information is excepted under section 552.101 in conjunction with common law privacy. We have marked the types of financial information the city must withhold in Exhibit 3. The city must withhold all federal tax forms under section 552.101 in conjunction with federal law. The city must withhold all compilations of criminal records regarding the named individuals to the extent that any of the named individuals appear as possible suspects. Finally, the city must withhold information pertaining to certain medical conditions under section 552.101 in conjunction with common law privacy. We have marked the types of medical information the city must withhold in Exhibit 6.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "E. Joanna Fitzgerald".

E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF\nc

Ref: ID# 133980

Encl: Submitted documents

cc: Mr. John Holsopple  
714 S. Deerfield Circle  
Arlington, Texas 76016  
(w/o enclosures)