



August 14, 2000

Ms. Julie Joe
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2000-3091

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137941.

The Office of the Attorney General (the "office") received two requests from the same requestor regarding personnel information. The first request states:

also send their photos; if we haven't already requested both personnel files and photos--or if their have been any additions, updates, changes, etc. to these--for john cornyn, clark ervin, becky payne, jon greytrock, and brenda loudermilk, then send them, too.

The second request states:

Remove redundant pages, exact duplicates, and those which you have indisputably already supplied.

No toll on the information whose existence you falsely denied, again.

No protection afforded by asking us for the very 'mailing, facsimile transmission . . .' you used.

Also send photo, bio, resume and personnel file for Michael Jay Burns.

You claim that portions of the requested information are excepted from disclosure under sections 552.101 and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

First, we address the various federal tax forms contained in the submitted personnel files. 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 office must withhold the tax forms from disclosure under section 552.101 as information deemed confidential by federal statute.

Next, we address your argument that certain medical information must be withheld under section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 encompasses confidentiality provisions such as 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). We agree that the medical information that you have marked is confidential under the ADA. *See* Open Records Decision No. 641 (1996).

You also claim that certain personal financial information is confidential under section 552.101. Section 552.101 also encompasses common law privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

While prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, this office has held that an employee's required participation in

¹You have submitted to this office two sets of the requested information: one complete set and one set redacted so as to indicate the information that you believe is excepted from required disclosure.

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 Nos. 600 at 9-10 (1992), 480 (1987). On the other hand, 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 at 10 (1992).

One of the submitted personnel files contains information regarding the distribution of funds from an employee's paycheck. It is unclear to us whether certain payments made by the employee were required or optional. Consequently, we are unable to determine whether or not those payments represent personal financial decisions on the part of the employee. To the extent that the payments were optional, they represent personal financial decisions and are confidential under common law privacy. Therefore, under section 552.101, the office must withhold whichever payments were optional. However, the office must release the financial information to the extent the employee was required to make such payments. We have marked the document that contains the financial information.

Finally, you claim that portions of the submitted personnel files are confidential under section 552.117 of the Government Code. Section 552.117 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. 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 protected by section 552.117(1) must be determined at the time the request for that information is made. Open Records Decision No. 530 at 5 (1989).

You explain that all of the employees who are the subjects of the submitted personnel files made timely elections for confidentiality under section 552.024. Consequently, the office must withhold the employees' home addresses, home telephone numbers, social security numbers, and any information that would reveal whether these employees have family members. While we agree with most of your "section 552.117 markings" on the redacted set of information that you provided to this office, we believe some additional information must be withheld as well. We have marked this additional information that the office must withhold under section 552.117 on the submitted non-redacted set of information.²

In conclusion, the office must withhold all federal tax forms under title 26, section 6103(a) of the United States Code. The office must withhold the medical information contained in

²We have tagged the documents containing this additional information to be withheld under section 552.117 with blue flags.

one of the submitted personnel files under section 552.101 in conjunction with the ADA. Under section 552.101 in conjunction with common law privacy, the office must withhold certain information from an employee's paycheck to the extent the information reflects an option that the employee exercised. Finally, the office must withhold the employees' home addresses, home telephone numbers, social security numbers, and information revealing whether the employees have family members under section 552.117.³

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).

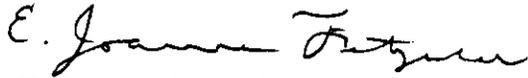
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

³Most of your markings in the submitted redacted set of documents are in accordance with this ruling. We have only marked a few documents in the submitted non-redacted set of documents that must be redacted differently so as to be consistent with this ruling.

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,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\er

Ref: ID# 137941

Encl: Submitted documents

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