



March 2, 2001

Mr. James G. Nolan
Supervising Attorney
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2001-0802

Dear Mr. Nolan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144651.

The Texas Workforce Commission (the "commission") received a request for a personnel file of a specified commission employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Pursuant to section 552.301(e)(1), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). The commission received the request on December 7, 2000 and, therefore, had until January 2, 2001 to submit a copy of the requested information. The submitted information was hand-delivered to this office and, therefore, does not contain a postmark. Further, you have not otherwise submitted proof that the information was delivered timely to this office. *See* Gov't Code § 552.308 (establishing proof of timeliness). This office stamped the date of receipt as January 3, 2001. Therefore, you have failed to comply with section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code

§ 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You argue that portions of the submitted information are excepted under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code. Section 552.103 is a discretionary exception and does not overcome the presumption of openness. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). However, sections 552.101, 552.102, and 552.117 of the Government Code provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Therefore, we will address these exceptions.

You argue that sections 552.101 and 552.102 of the Government Code except personal financial and medical information in the submitted information. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Id.* The doctrine of common law privacy protects information that 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 the information must be of no legitimate concern to the public. *Id.*

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987). After reviewing the submitted information, we agree that some of the information must be withheld under section 552.101 in conjunction with common law privacy. We have marked the information that you must withhold.

You also assert that family member information and the social security number of the employee are excepted under section 552.117(1) of the Government Code. Section 552.117(1) excepts from disclosure information that relates to the home addresses, home telephone numbers, social security numbers and family member information of current or former employees of a governmental body. Section 552.117(1) information must be withheld only if the employee elected to keep this information confidential pursuant to section 552.024 prior to the date on which the commission received the request. *See* Open Records No. 622 (1994) (providing that election must be made prior to date request received for each piece of information). The submitted information contains an election form in which the employee allowed access to her home telephone number and home address. You have provided a computer printout which reflects that the employee elected to release her home address and home telephone number. Therefore, you must release the employee's home address and home telephone number. However, you have not submitted any evidence that the employee filled out an election form to withhold her family member information and her social security number. Therefore, you must withhold most of the highlighted information under section 552.117(1) of the Government Code only if the employee elected to withhold her social security number and family member information prior to December 7, 2000. We have also marked some additional information that must be withheld under section 552.117(1) of the Government Code. If the employee failed to make a section 552.024 election for her family member information and her social security number or made the election after December 7, 2000, you may not withhold any information under section 552.117(1) of the Government Code.

If the employee did not make a timely election to have her social security number withheld, the social security number may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are 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.* However, it is not apparent to us that the social security number was obtained or maintained by the commission 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 commission to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security number at issue was obtained or maintained pursuant to such a statute and is, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution the commission, 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 number, the commission should ensure that this number was not obtained or maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

In conclusion, you must withhold certain information we have marked under sections 552.101 and 552.102 in conjunction with common law privacy. You must also withhold the employee's social security number and family member information under

section 552.117(1) of the Government Code if the employee made a timely section 552.024 election to withhold this information. If the employee failed to make an election with regard to the social security number, the social security number may be excepted under federal law. You must release the remaining information.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/er

Ref: ID# 144651

Encl: Submitted documents

cc: Mr. Jose Santana
1122 Tetbury Lane
Austin, Texas 78748
(w/o enclosures)