



June 15, 2001

Mr. Joe Jackson
Assistant City Attorney
City of College Station
P.O. Box 9960
College Station, Texas 77842

OR2001-2559

Dear Mr. Jackson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148479.

The City of College Station (the "city") received a request for "information and reasons for [a named employee] leaving employment at the [city]," including dates of employment, job title, job responsibilities, and whether or not the employee is eligible for rehire. You claim that portions of the requested information are excepted from disclosure under sections 552.103, 552.117, 552.130, and 815.503 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that portions of the submitted information must be withheld from disclosure under section 552.102 of the Government Code.² 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.*

¹You inform us that you have released most of the requested documents to the requestor with certain personal information redacted pursuant to sections 552.117 and 552.130 of the Government Code. You have submitted the same documents to this office with this personal information redacted. Section 552.301 of the Government Code requires the governmental body to submit the requested information to this office in a manner that permits us to decide whether the information is excepted from disclosure. By totally obliterating what you claim is personal information, you made it impossible for this office to review those portions of the documents. You thus failed to request a decision in the manner prescribed by section 552.301. In the future, failure to comply completely with section 552.301 will result in a decision that the requested information is public and must be released in its entirety. See Gov't Code §§ 552.006, .301(e), .302.

²The Office of the Attorney General will raise a mandatory exception like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code.³ See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (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. *Id.* at 685.

This office has previously found that financial information relating to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that 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). A public employee's allocation of his salary to a *voluntary* investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common law right of privacy if the transactions are not funded in whole or in part with public monies. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1992) (deferred compensation plan). Where a transaction is funded in part by the state, however, it involves the expenditure of public monies in which there exists a legitimate public interest, and the transaction is therefore not protected by privacy. Open Records Decision No. 600 (1992). We have marked the information that the city must withhold under section 552.102.

We turn now to your claimed exceptions. You contend that exhibits 45, 46, and 47 are excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard*

³Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

v. Houston Post Co., 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You state that the information in Exhibits 45, 46, and 47 relate to litigation by the State of Texas against the named employee. You have provided a copy of an indictment brought by the State of Texas against the named employee. The city, however, is not a party to this criminal litigation. Therefore, the city may not withhold Exhibits 45, 46, or 47 under section 552.103 of the Government Code.

You also assert that portions of the submitted information are excepted from disclosure under section 552.117 of the Government Code. 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).

You have submitted information that indicates that the employee whose information is sought made a timely election under section 552.024 requesting that the city withhold her home address and home telephone number. Therefore, pursuant to section 552.117(1) of the Government Code, the city must not release this employee's home address or home telephone number to the requestor. However, there is no indication that this employee made an election under section 552.024 requesting that the city withhold her social security number or family member information. If no such election was made, the city may not withhold the employee's social security number or family member information under section 552.117 of the Government Code.

If the employee did not timely elect to withhold her social security number as prescribed by section 552.024, the social security number may nevertheless be confidential under federal law. A social security number may be withheld in some circumstances 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.* We have no basis for concluding that any of the social security numbers in the responsive records are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the city should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Next, you contend that portions of the submitted information are excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part that “[i]nformation is excepted from the requirements 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[.]” Therefore, the city must withhold the employee’s driver’s license information pursuant to section 552.130 of the Government Code.

You argue that the information in Exhibit 36 should be withheld from disclosure pursuant to section 815.503 of the Government Code, which provides as follows:

Records of members and annuitants under *retirement plans* administered by the [Employees Retirement System] that are in the custody of the system or of an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure and are exempt from the public access provisions of [the Public Information Act] [Emphasis added.]

We note that although the employee may receive certain insurance benefits through the Employees Retirement System, the employee’s retirement benefits are administered by the Texas Municipal Retirement System. Because section 815.503 of the Government Code applies only to records of public employees who are members of the Employees Retirement System, this provision does not protect any information in the employee’s personnel file. We note, however, that the designation of a retirement beneficiary is protected from disclosure under section 552.101. Open Records Decision No. 600 (1992). We have marked the information that must be withheld from Exhibit 36 accordingly.

Finally, you assert that Exhibits 60 and 61 — the employee’s W-4 Forms — should be withheld from disclosure. Title 26, section 6103(a) of the United States Code renders tax return information confidential. The term “return information” includes “the nature, source, or amount of income” of a taxpayer. 26 U.S.C. § 6103(b)(2). This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989). Our office has specifically held that W-4 Forms must be withheld in their entirety. Open Records Decision No. 600 at 9 (1992). Therefore, you must withhold the submitted W-4 Forms.

To summarize, we conclude that: (1) portions of the submitted information, which we have marked, must be withheld under section 552.102 of the Government Code; (2) the city may not withhold Exhibits 45, 46, or 47 under section 552.103; (3) the city must withhold the employee’s home address and home telephone number under section 552.117; (4) the city may not withhold the employee’s social security number or family member information under section 552.117(1) if the employee did not make a timely election to keep this information confidential pursuant to section 552.024; (5) prior to releasing the employee’s social security number, the city should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990;

(6) the city must withhold the employee's driver's license information under section 552.130; (7) the city must withhold the information we have marked in Exhibit 36 under section 552.101; and (8) the city must withhold Exhibits 60 and 61 in their entirety.

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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 148479

Enc: Marked documents

cc: Ms. Sue Shahan
Texas Engineering Extension Service
301 Tarrow
College Station, TX 77840
(w/o enclosures)