



June 29, 2001

Ms. Elizabeth Lutton  
Senior Attorney  
City of Arlington  
P.O. Box 231  
Arlington, Texas 76004-0231

OR2001-2798

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# 148938.

The City of Arlington (the "city") received a request for copies of all records pertaining to the disability and retirement of a specific person. You state that you are releasing information pertaining to the resignation of the individual. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you raise and have reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. We note that, in this instance, most of the submitted records are confidential under section 552.101 in conjunction with 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. 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 or her job, is to be treated as a confidential medical record as well. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC")

has determined that medical information for the purposes of the ADA includes “specific information about an individual’s disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked the documents that are confidential and must be withheld under section 552.101 in conjunction with the ADA.<sup>1</sup>

You claim that the information submitted as Exhibit 2 is protected from disclosure under section 552.101 in conjunction with section 803.402 of the Government Code. Section 803.402 of the Government Code provides, in pertinent part, that “records of members and beneficiaries of a retirement system . . . that are *in the custody of any retirement system* . . . are confidential and not subject to disclosure and are exempt from the public access provisions of Chapter 552.” (Emphasis added.) Section 825.507 of the Government Code provides, in relevant part, that “[i]nformation contained in records that are *in the custody of the retirement system* concerning an individual member, retiree, annuitant, beneficiary, or alternate payee is confidential under section 552.101, and may not be disclosed in a form identifiable with a specific individual.” (Emphasis added.) Since the information in Exhibit 2 is in the custody of the city, and not the retirement system, sections 803.402 and 825.507 are inapplicable. Thus, the city may not withhold the remaining information in Exhibit 2 pursuant to section 552.101 in conjunction with sections 803.402 and 825.507 of the Government Code.

You also claim that some of the submitted information is protected from disclosure pursuant to section 552.102 of the Government Code. 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. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See id.* at 685; *see also* Open Records Decision No. 611 at 1 (1992). 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, but that there is a legitimate public interest in the

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<sup>1</sup>We note that if the city gets a subsequent request for these documents from a different requestor, the city must ask for another ruling.

essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common law right of privacy. *See* Open Records Decision No. 545 (1990). Likewise, an employee's designation of a retirement beneficiary or direct deposit authorization is excepted from disclosure under the common law right to privacy. *See* Open Records Decision No. 600 (1992). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992). After careful review, we have marked the personal financial information that must be withheld under section 552.101.

Finally, you claim that some of the submitted information is 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 of the Government Code. Notations in the submitted records indicate that the individual elected to restrict access to his home address and telephone number. Thus, we agree that the city must withhold this information from disclosure under section 552.117. However, we have no indication that the individual also elected to withhold his social security number or family member information from disclosure. Consequently, the city may only withhold the marked social security number and family member information if the individual elected to withhold this information under section 552.024 prior to separating from employment. *See* Open Records Decision No. 530 at 5 (1989) (stating whether particular piece of information is protected by section 552.117 must be determined at time request for it is made).

If the employee did not elect to withhold his social security number as prescribed by section 552.024, his social security number may nevertheless be confidential under federal law. A social security number or "related record" 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.* 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 social security numbers. 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 the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers at issue, you should ensure that the numbers were not obtained or are maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

In summary, we have marked the information you must withhold under section 552.101 in conjunction with the ADA. You must also withhold from disclosure the marked personal financial information pursuant to section 552.101 in conjunction with the common law right to privacy. The individual's home address and phone must be withheld under section 552.117. You must also withhold the individual's social security number and family member information under section 552.117 if he made a timely election under section 552.024.

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).

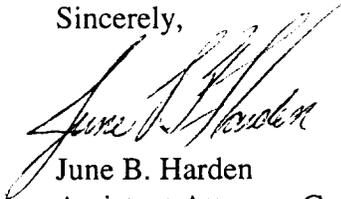
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/RJB/seg

Ref: ID# 148938

Enc. Marked documents

c: Mr. Johnny Christopher Cantu  
745 Beverly Drive  
Burleson, Texas 76028  
(w/o enclosures)