



July 11, 2001

Mr. Ron G. MacFarlane, Jr.
Sifford, Anderson, Vice & MacFarlane, L.L.P.
2001 Bryan Street, Suite 2050
Dallas, Texas 75201

OR2001-3000

Dear Mr. MacFarlane:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149242.

The City of Cedar Hill (the "city"), which you represent, received a request for 14 categories of information, most of which relate to a named city police officer. You inform us that most of the requested information is being made available to the requestor, but you claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.122 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You contend that information in Exhibits C is excepted under section 552.102 in conjunction with common law privacy. Section 552.102 protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). For information to be protected from public disclosure under the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may 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. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

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).

Information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Therefore, the fact that an employee participates in a group insurance plan funded by a governmental employer and the amount of any payroll deduction therefor 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 right of privacy, *id.* at 10-11. Similarly, this office has determined that information revealing the personal financial decision to voluntarily have certain deductions made from an employee's paycheck meets the *Industrial Foundation* test. Open Records Decision No. 545 (1990). This office has held that personal financial information not related to a financial transaction between an individual and a governmental body is protected by common law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We agree that you may withhold the information you have marked in Exhibit C under section 552.102, except as indicated by our markings. We have marked certain additional information in Exhibit C that must be withheld under section 552.102 and common law privacy.

You also contend that medical information in Exhibit C is excepted under section 552.102. Section 611.002 of the Health and Safety Code applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." *See also* Health & Safety Code § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked mental health records in Exhibit C that are confidential under section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

In addition, Exhibit C contains medical records, access to which is governed by the Medical Practice Act, ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the medical records subject to the MPA.

Exhibit C contains W-4 forms. 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 in Exhibit C.

Exhibit C also contains an I-9 form. Release of employment eligibility verification form I-9 is governed by title 8, section 1324a of the United States Code. This statute provides that I-9 forms "may not be used for purposes other than for enforcement of [the immigration laws of] this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under chapter 552 of the Government Code would not be for a permitted purpose; accordingly, we conclude that the I-9 form in Exhibit C is confidential and must be withheld under section 552.101 of the Government Code.

You also assert that section 552.108 of the Government Code excepts the information in Exhibit E. The information in this exhibit consists of itemized cellular phone bills for the cell phone assigned to the named officer. Section 552.022(a) of the Government Code provides in pertinent part:

Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body.

Gov't Code § 552.022(a)(3) (emphasis added). We conclude that these bills, in their entirety, are "information in an account [or] voucher. . . relating to the expenditure of public funds," and therefore, as prescribed by section 552.022, the bills must be released to the requestor unless they are expressly made confidential under other law. You argue that the submitted information is excepted from disclosure under sections 552.108 and 552.117 of the Government Code. Section 552.108 is a discretionary exception and not "other law" that makes information "expressly confidential" for purposes of this section.¹ Therefore, you may not withhold the submitted information in Exhibit E under this section.

Section 552.117(2) of the Government Code, however, excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We agree that the information you have marked in Exhibit C and E must be withheld under section 552.117(2), except as noted. We have also marked some additional information in Exhibit C that you must withhold under section 552.117(2). In addition, if the named officer paid directly for the purchase, installation, and billing of the cellular phone at issue which is installed in his private vehicle, then the number of the cellular phone belonging to the officer that appears in Exhibit E must also be withheld from the requestor under section 552.117(2). *See* Open Records Decision No. 506 (1988) (interpreting predecessor to section 552.117). The remaining information in Exhibit E must be released to the requestor.

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

Further, you contend that Exhibit D contains "test items" which are excepted under section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). After reviewing the submitted information in Exhibit D, we agree that a portion of the questions and answers are "test items" which may be withheld under section 552.122 of the Government Code. We have marked the information within Exhibit D that may be withheld under section 552.122(b). The remainder of the information in this exhibit must be released, with the exception of the information you have marked to be withheld under section 552.117(2), which must be withheld under that section.

Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement 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; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

The city must withhold under section 552.130 the Texas driver's license numbers, including the copy of the driver's license, as well as vehicle identification numbers, appearing in the submitted information.

Finally, we note that the 77th Texas legislature recently added section 552.136(b) to the Government Code which provides in pertinent part that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." See Act of May 14, 2001, 77th Leg., R.S., S.B. 694 (to be codified at Tex. Gov't Code, § 552.136) (effective May 26, 2001). We have marked the credit card number within the submitted information that must be withheld under section 552.136(b).

To summarize, the city must withhold the information you have marked in Exhibit C under section 552.102, except as indicated by our markings. We have marked certain additional information in Exhibit C that must be withheld under section 552.102 and common law privacy. Medical records and mental health records may only be released in accordance with the MPA and sections 611.004 and 611.0045 of the Health and Safety Code, respectively

The city must withhold the submitted W-4 and I-9 forms in Exhibit C under section 552.101. We agree that the information you have marked in Exhibit C, D, and E must be withheld under section 552.117(2), except as noted. We have also marked some additional information in Exhibit C that you must withhold under section 552.117(2). The information we have marked within Exhibit D may be withheld under section 552.122(b). The city must withhold under section 552.130 the Texas driver's license numbers, including the copy of the driver's license, as well as vehicle identification numbers, appearing in the submitted information. The credit card number within the submitted information that we have marked must be withheld under section 552.136(b). The remainder of the submitted information must be released to the requestor.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 149242

Enc. Submitted documents

c: Mr. Alan C. Kazdoy
Attorney at Law
701 Commerce Street, Suite 400
Dallas, Texas 75202
(w/o enclosures)