



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

January 7, 2003

Mr. Robert E. Hager  
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Dallas, Texas 75201

OR2003-0119

Dear Mr. Hager:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174592.

The City of Duncanville (the "city"), which you represent, received a request for all files records, and documents relating to a named retired fire fighter. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and 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, such as section 143.089(g) of the Local Government Code. Section 143.089 of the Local Government Code provides in pertinent part:

(a) The director [of the fire fighters' or police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

....

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter ....

....

(g) A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Thus, section 143.089 contemplates two different types of personnel files, a fire fighter's civil service file that the civil service director is required to maintain, and an internal file that the fire department (the "department") may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a fire department takes disciplinary action against a fire fighter, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the fire fighter's civil service file maintained under section 143.089(a). Such records are subject to release under chapter 552 of the Government Code. See Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You first state that the requested records are covered by section 143.089(g). However, you then advise that some information is maintained by the Human Resources Director. We do not believe that this practice is appropriate in light of section 143.089, which contemplates only two files and does not provide for a third file to be maintained by the Human Resources Director. Therefore, you must place the information that is maintained by the Human Resources Director in either the department's internal file or the civil service director's file. To the extent that information is placed in the department's internal file, it is confidential and cannot be released. To the extent that information is placed in the civil service director's file, it is subject to disclosure. However, information that is subject to public disclosure may still be excepted from disclosure under the exceptions in chapter 552 of the Government Code. Therefore, we will address the remaining exceptions you claim in the event the information is placed in the civil service file.

You claim that some of the information is excepted from disclosure under section 552.101 in conjunction with common-law privacy, and under section 552.102. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is protected by the common law right of privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976).

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 in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. See *Industrial Found.*, 540 S.W.2d at 683-85. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has also determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. See Open Records Decision Nos. 600 (1992) (Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. Thus, information about the essential features of an employee's participation in a group insurance program funded in part by the state involves him in a transaction with the state and, therefore, is not excepted from disclosure by a right of privacy. 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). We have marked the personal financial information that is excepted from disclosure under section 552.101 and common-law privacy.

You also contend that certain information pertaining to the employee's retirement benefits is made confidential under section 815.503 of the Government Code, which protects certain information contained in records that are in the custody of the retirement system concerning an individual member, retiree, annuitant, or beneficiary. The submitted documents are in the custody of the department, not the retirement system. Thus, we conclude that the documents are not confidential under section 815.503. However, we conclude that some of the documents pertaining to retirement benefits involve personal financial information. We have marked the retirement documents that must be withheld under section 552.101.

We note that the submitted documents contain W-4 forms that must be withheld under section 552.101. Employee W-4 forms are excepted from disclosure under section 552.101

in conjunction with section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992). The department must therefore withhold the W-4 forms, which we have marked, under section 552.101.

We also find that certain information contained in the records submitted is confidential under 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). *See also* Open Records Decision No. 641 (1996). The 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 information that the city must withhold under section 552.101 and the ADA.

We also note that some of the records at issue are medical records, access to which is governed by the Medical Practice Act (the "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). The medical records we have marked may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991).

Section 552.117 of the Government Code may be applicable to some of the submitted information. 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)*. Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the fire fighter whose information is at issue timely elected to keep his personal information confidential, the city must withhold his home addresses and telephone numbers, social security numbers, and any information that reveals whether he has family members. The city may not withhold this information under section 552.117 if the fire fighter did not make a timely election to keep the information confidential. We have marked the information that is potentially confidential under section 552.117.

We note that if a social security number is not excepted under section 552.117, it may be withheld in some circumstances under section 552.101 of the Government Code. 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 or 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 the social security number in the document is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, you 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.

We further note that the court documents that we have marked under section 552.117 may be withheld only if the fire fighter made a timely election under section 552.024. These documents have apparently been filed with a court and are therefore subject to section 552.022(a)(17). Section 552.022(a)(17) provides:

- (a) 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:

.....

(17) information that is also contained in a public court record . . . .

Gov't Code § 552.022(a)(17). Thus, information contained in the court documents must be released under section 552.022 unless it is expressly confidential under other law. The court documents contain information that may be excepted from disclosure under section 552.117(1). Section 552.117 is considered "other law" for purposes of section 552.022. Therefore, you must withhold the court documents as marked under section 552.117 if the fire fighter made a timely election under section 552.024.

The submitted documents contain driver's license information. Section 552.130 of the Government Code excepts from disclosure information relating to a driver's license issued by an agency of this state. Any information relating to the Texas driver's license must be withheld under section 552.130. We have marked this information for your convenience.

Finally, the submitted information contains bank account numbers. Section 552.136 of the Government Code states 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." Gov't Code § 552.136. The city must, therefore, withhold the marked bank account numbers under section 552.136.

To summarize: To the extent any of the submitted information is placed solely in the department's personnel file, it is confidential under section 143.089(g) of the Local Government Code; to the extent the information is placed in the civil service file, it must be released except as follows. You must withhold the medical and personal financial information we have marked that is protected by common law privacy and therefore excepted from disclosure under sections 552.101 and 552.102. We have also marked the W-4 forms, ADA information, and medical records that are made confidential by statute and must be withheld under section 552.101. You must also withhold under section 552.117(1) those portions of the records that we have marked that reveal the fire fighter's home address, home telephone number, social security number, and whether the fire fighter has family members if the fire fighter made a timely election under section 552.024. We have also marked the motor vehicle information that must be withheld under section 552.130 and the account numbers that must be withheld under section 552.136.

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).

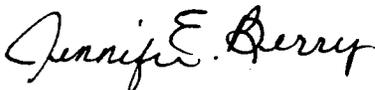
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 E. Berry  
Assistant Attorney General  
Open Records Division

JEB/sdk

Ref: ID# 174592

Enc: Submitted documents

c: Ms. Theresa M. Powers  
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(w/o enclosures)