



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 23, 2003

Ms. Ann Manning
McWhorter, Cobb and Johnson, L.L.P.
P.O. Box 2547
Lubbock, Texas 79408

OR2003-0484

Dear Ms. Manning:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175479.

The Post Independent School District (the "district"), which you represent, received a request for information regarding a specified incident involving a district employee and a named detainee in the Garza County Regional Juvenile Facility. You state that some responsive information has been released to the requestor. You also indicate that the district does not possess information responsive to some parts of the request. The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984). You claim that certain requested personnel 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 of the Government Code 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. The submitted documents contain the employee's W-4 forms. A W-4 form is confidential under section 6103 of title 26 of the United States Code. Therefore, the district must withhold the W-4 forms under section 552.101 of the Government Code in conjunction with federal law.

Next, criminal history record information ("CHRI") is confidential and not subject to disclosure. Federal regulations prohibit the release of CHRI maintained in state and local

CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; see also *id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, you must withhold any CHRI falling within the ambit of these state and federal regulations from the requestor pursuant to section 552.101 of the Government Code.

You contend that a portion of the personnel information at issue is excepted from disclosure under section 552.102(a) of the Government Code. Section 552.102(a) 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(a) 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. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102(a) claims together.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses the doctrine of common-law 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 Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has found that personal financial information is generally excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy). This office has also ruled, however, that the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan

funded partly or wholly by governmental body is not excepted from disclosure). We have marked personal financial information that the district must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102 of the Government Code also protects from disclosure most information on a transcript from an institution of higher education maintained in the personnel files of professional public school employees. Gov't Code §552.102(b). Section 552.102(b) excepts from disclosure all information from transcripts other than the employee's name, the courses taken, and the degree obtained. Open Records Decision No. 526 (1989). Accordingly, with the exception of the employee's name, courses taken, and degree obtained, we determine that the district must withhold the submitted transcripts from disclosure under section 552.102 of the Government Code.

You also seek to withhold the employee's Examination for the Certification of Educators in Texas ("ExCET") score report under section 552.102. The ExCET examination report, however, is not "a transcript from an institution of higher education" and, therefore, may not be withheld under section 552.102(b). *Cf.* Open Records Decision No. 526 (1989) (section 552.102(b) excepts certain portions of professional public school employees' college transcripts from required public disclosure); *see generally* Open Records Decision Nos. 444 at 5-6 (1986) (public employee's qualifications and performance are subject to a legitimate public interest); 441 at 3 (1986) (identities of teachers who did not pass the TECAT examination are matter of legitimate public interest). We determine that the district may not withhold the submitted ExCET score report under section 552.102 of the Government Code.

We note that the submitted documents contain information that may be 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 timely elect to keep this information confidential pursuant to section 552.024. Whether information is protected by section 552.117 must be determined at the time the request for information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district 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. Consequently, if the employee at issue timely elected to keep his social security number, home address and telephone number, and family member information confidential, the district must withhold this information from the remaining documents under section 552.117 of the Government Code. If the employee did not timely elect to keep this information confidential, the district may not withhold the information under section 552.117 of the Government Code.

We note, however, that if the employee did not timely elect to keep his social security number confidential pursuant to section 552.024, the social security number may be confidential 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 submitted documents 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 the employee's social security number, the district should ensure that the social security number was not obtained and is not maintained by the school district pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the district must withhold W-4 forms under section 552.101 of the Government Code in conjunction with federal law. Any criminal history report information must be withheld pursuant to section 552.101 in conjunction with chapter 411 of the Government Code and federal regulations. We have marked personal financial information that the district must withhold under section 552.101 in conjunction with common-law privacy. With the exception of the employee's name, courses taken, and grades obtained, the district must withhold the submitted transcripts under section 552.102(b) of the Government Code. If the employee timely elected to keep personal information confidential pursuant to section 552.024, the district must withhold the information we have marked pursuant to section 552.117 of the Government Code. The employee's social security number may be confidential under section 552.101 in conjunction with federal law. 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 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 175479

Enc: Submitted documents

c: Mr. Bill J. Helwig
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(w/o enclosures)