



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

April 28, 2003

Ms. Belinda R. Perkins  
Assistant General Counsel  
Teacher Retirement System of Texas  
1000 Red River Street  
Austin, Texas 78701-2698

OR2003-2844

Dear Ms. Perkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180124.

The Teacher Retirement System of Texas ("TRS") received a request for three categories of salary information relating to a named individual. You state that TRS does not have documents responsive to the first category of the request.<sup>1</sup> You indicate that you have released some of the requested information. You claim that some of the submitted information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We first note that you notified the individual named in the request pursuant to section 552.305 of the Government Code. *See* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). Accordingly, we turn to your arguments with respect to the submitted information.

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<sup>1</sup>We note that the Public Information Act (the "Act") does not require TRS to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

You argue that information you have highlighted in green is excepted from disclosure under section 552.101 in conjunction with title 26 of section 6103(a) of the United States Code. 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. Section 6103(a) makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). 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 Form from disclosure. However, we find that the remaining information highlighted in green was not gathered by the Internal Revenue Service in accordance with title 26 of section 6103(a) of the United States Code. Accordingly, you may not withhold the remaining submitted information on this basis.

You next assert that section 825.507 of the Government Code applies to some of the submitted information. This section provides in pertinent part:

(a) Records of a participant that are in the custody of the retirement system... are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section.

(b) The retirement system may release records of a participant...to:

(1) the participant or the participant's attorney or guardian or another person who the executive director determines is acting on behalf of the participant;

(2) the executor or administrator of the deceased participant's estate, including information relating to the deceased participant's beneficiary;

(3) a spouse or former spouse of the participant if the executive director determines that the information is relevant to the spouse's or former spouse's interest in member accounts, benefits, or other amounts payable by the retirement system;

(4) an administrator, carrier, consultant, attorney, or agent acting on behalf of the retirement system;

- (5) a governmental entity, and employer, or the designated agent of an employer, only to the extent the retirement system needs to share the information to perform the purposes of the retirement system, as determined by the executive director;
- (6) a person authorized by the individual to receive the information;
- (7) a federal or state criminal law enforcement agency that requests a record for a law enforcement purpose;
- (8) the attorney general to the extent necessary to enforce child support; or
- (9) a party in response to a subpoena issued under applicable law if the executive director determines that the participant will have a reasonable opportunity to contest the subpoena.

....

(g) In this section, "participant" means a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system.

The information you have highlighted in yellow falls within the confidentiality provision set forth in section 825.507 of the Government Code. You do not inform this office whether the stated exceptions to section 825.507 apply. Therefore, to the extent that the exceptions to section 825.507 do not apply to the information at issue, you must withhold the yellow-highlighted information under section 552.101. If the exceptions do apply to this information, you may release the information at issue in accordance with section 825.507 of the Government Code.

Next, you assert that some of the remaining submitted information is excepted from disclosure under section 552.101 in conjunction with common-law privacy. Section 552.101 also makes confidential information protected by common-law privacy. Additionally, you raise section 552.102, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 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 v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. We will therefore consider your privacy claim

under section 552.101 and section 552.102 together. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. 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. 540 S.W.2d at 685.

This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. 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) (credit reports, financial statements, and other personal financial information), 373 (1983) (assets and income source information.) Where a transaction is funded in part by the state, however, 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. After carefully reviewing the information you have highlighted in pink under section 552.101 in conjunction with common-law privacy, we find that most of this information is private. Accordingly, you must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find that the remaining information is not highly intimate or embarrassing, and may not be withheld on the basis of common-law privacy.

Next, you assert that the remaining submitted information highlighted in orange is excepted from disclosure under section 552.117. Section 552.117(1) 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. A governmental body may not, however, withhold the information of a current or former employee or official who made the request for confidentiality under section 552.024 after a request for information is made. *See* Open Records Decision No. 530 at 5 (1989) (whether particular piece of information is public must be determined at time request for it is made). You state, and provide documentation showing, that at the time TRS received the request for information, the named employee elected to withhold his home address, telephone number, social security number and family member information from public disclosure. Accordingly, we agree that the remaining submitted information you have highlighted in orange must be withheld pursuant to section 552.117(1).

In summary, you must withhold the W-4 Form in the submitted information under section 552.101 in conjunction with title 26 of section 6103(a) of the United States Code. You must withhold the yellow-highlighted information under section 552.101 in conjunction with section 825.507 of the Government Code unless an exception applies. You must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. Finally, you must withhold the remaining orange-highlighted information under section 552.117(1). The remaining 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 Dep't of Pub. 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,



V.G. Schimmel  
Assistant Attorney General  
Open Records Division

VGS/sdk

Ref: ID# 180124

Enc: Submitted documents

c: Ms. Dianne C. Meyers  
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(w/o enclosures)