



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

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Ms. Katherine A. Antwi  
General Counsel  
Texas Commission on Human Rights  
P.O. Box 13006  
Austin, Texas 78711-3006

OR2004-0559

Dear Ms. Antwi:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 195088.

The Texas Commission on Human Rights (the "commission") received a request for the personnel records of two named employees. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the information you submitted to this office as responsive to the request contains information that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. *See* Gov't Code §§ 552.022(a)(1) ("a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108"<sup>1</sup>); 552.022(a)(13) ("a policy statement or interpretation that has been adopted or issued by an agency"); 552.022(a)(15) ("information regarded as open to the public under an agency's policies"). The information subject to section 552.022 must therefore be released unless the information is expressly made confidential under other law.

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<sup>1</sup>You do not claim section 552.108 as an exception to disclosure.

You contend that section 552.103 of the Government Code excepts this information from public disclosure. However, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Thus, the information subject to the purview of section 552.022 may not be withheld from disclosure under section 552.103. You also argue that sections 552.101 and 552.102 except the submitted information from public disclosure. As sections 552.101 and 552.102 are considered confidentiality provisions for the purposes of section 552.022, we will consider the application of those sections to all of the submitted information.

We first address the applicability of section 552.103 of the Government Code to the portions of the submitted information not subject to section 552.022. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under 552.103(a).

You indicate that the commission is currently involved in a lawsuit and have submitted to this office the plaintiff's original petition and other pleadings in Cause No. GN-204541, filed in the 98<sup>th</sup> District Court of Travis County. We find that the commission was a party to this

case prior to the date that it received the instant request for information. You have not, however, explained how the requested information is related to the subject matter of this litigation. Therefore, you have not demonstrated, and we are unable to determine, the applicability of the requested information to the pending litigation. Accordingly, the commission may not withhold any portion of the submitted information that is not subject to the purview of section 552.022 under section 552.103 of the Government Code.

We next address your arguments under sections 552.101 and 552.102 for all of 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. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of submitted I-9 forms in response to this request for information would be “for purposes other than for enforcement” of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. A W-4 form is confidential under section 6103 of title 26 of the United States Code. Therefore, the commission must withhold the I-9 and W-4 forms under section 552.101 of the Government Code in conjunction with federal law.

You next claim that portions of the submitted information are excepted from disclosure pursuant to sections 552.101 and 552.102 of the Government Code in conjunction with the common-law right of 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, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) 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.*, 540 S.W.2d at 683-85. Accordingly, we address your section 552.101 and section 552.102 claims together under the common-law right to privacy.

We note that information is protected from disclosure by the common-law right to privacy 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.* The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. *Id.*

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 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. 600 (1992) (finding designation of beneficiary of employee's retirement benefits, direct deposit authorization, TexFlex benefits, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care related to personal financial decisions). 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).

In addition, this office has found that the following types of information are not excepted from required public disclosure under 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); information regarding an individual's profession or business, organizational memberships, or religious affiliation, *see* Open Records Decision No. 674 (2001); job qualifications, including college transcripts, *see* Open Records Decision No. 470 (1987); age, salary, title, and date of employment, *see* Open Records Decision Nos. 455 (1987), 373 (1983); licenses, certificates, and professional awards, *see* Open Records Decision Nos. 444 (1986), 342 (1982); educational background and training, *see* Open Records Decision Nos. 455 (1987), 444 (1986); past work history, *see* Open Records Decision No. 455 (1987), 444 (1986); names, addresses, and telephone numbers of job references, *see* Open Records Decision No. 455 (1987); performance evaluations, *see* Open Records Decision Nos. 470 (1987), 400 (1983); and reasons for a public employee's demotion, dismissal, or resignation, *see* Open Records Decision Nos. 444 (1986), 329 (1982), 278 (1981).

Additionally, we note that a portion of the submitted information relates to allegations of sexual harassment. Pursuant to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the identities of witnesses to and victims of alleged sexual harassment are protected by the common-law privacy doctrine and must be withheld.

Based on our review of your representations and the information at issue, we conclude that the information that we have marked, which includes the identifying information of witnesses to and victims of alleged sexual harassment, is protected by the common-law right

of privacy and must be withheld under sections 552.101 and 552.102 of the Government Code.

We further note that the submitted records contain information subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether section 552.117 protects information from disclosure depends on when the request for information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the commission must withhold personal information under section 552.117(a)(1) on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the commission received the present request for information. For those employees who timely elected to keep their personal information confidential, the commission must withhold the information that we have marked under section 552.117(a)(1). The commission may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

Even if an employee has not made a timely election under section 552.024, 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.* We have no basis for concluding that any of the social security numbers in the file are 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 Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the commission should ensure that no such information was obtained or is maintained by pursuant to any provision of law enacted on or after October 1, 1990.

We further observe that section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Thus, we have marked the information in the submitted documents that the commission must withhold pursuant to section 552.130.

Finally, we note that the submitted information also contains an e-mail address obtained from a member of the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential, and provides as follows:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (Vernon) (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. Based on our review of the submitted information, we find that the e-mail address contained within this information is excepted from disclosure under section 552.137(a). Unless the commission has received affirmative consent for the release

of this e-mail address, we conclude that the commission must withhold the e-mail address that we have marked pursuant to section 552.137(a) of the Government Code.

In summary, the commission must withhold the I-9 and W-4 forms under section 552.101 of the Government Code in conjunction with federal law. The information that we have marked is protected by the common-law right of privacy and must be withheld under sections 552.101 and 552.102 of the Government Code. For those employees who timely elected to keep their personal information confidential, the commission must withhold the information that we have marked under section 552.117(a)(1). The commission may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential. Social security numbers may be confidential under federal law. We have marked the information in the submitted documents that the commission must withhold pursuant to section 552.130. Unless the commission has received affirmative consent for the release of the marked e-mail address, it must be withheld pursuant to section 552.137(a). The remaining 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 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,



Debbie K. Lee  
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Open Records Division

CN/DKL/jh

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