



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 24, 2004

Ms. Myrna S. Reingold  
Galveston County  
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Galveston, Texas 77550-1454

OR2004-2240

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198162.

The Galveston County Human Resources Department (the "department") received a request for documents evidencing the following categories of information: (1) the date and circumstances to the end of a named individual's employment in the district clerk's office, (2) the position she held and her annual salary at the time of her departure, (3) her age, and (4) any agreement between that individual and the county regarding her health insurance benefits after her departure. You state that you are releasing some responsive information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.115, 552.117, 552.130, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Because your claim under section 552.103 is potentially the broadest, we address it first. Section 552.103 of the Government Code provides in part 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.

Gov't Code § 552.103(a), (c). The department 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. *Univ. of Tex. Law Sch. v. Tex. 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 department must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and provide documentation showing, that litigation involving Galveston County is currently pending in the 10<sup>th</sup> Judicial District Court of Galveston County under cause number 03CV1871. You further state that litigation was pending when the department received the present request. You inform us that the pending litigation concerns a named individual's retirement benefits, and that the current request seeks information concerning this same individual's retirement benefits. Accordingly, we agree that the submitted information you seek to withhold under section 552.103 relates to the pending litigation. Thus, the department may withhold some of the information it has marked pursuant to section 552.103 of the Government Code.

We note, however, that some of the documents at issue reflect that they have been obtained from or provided to the opposing party. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending lawsuit is not excepted from disclosure under section 552.103(a) and must be disclosed.

We now address your arguments for the information which was obtained from or provided to the opposing party, as well as the remaining submitted information, which you do not seek to withhold under section 552.103. 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 other statutes make confidential. Section 845.115(a) of the Government Code protects certain information contained in records that are in the custody of the retirement system concerning an individual member, retiree, annuitant, or beneficiary. The documents at issue are in the custody of the department, not the retirement system. Thus, we conclude that the department may not withhold any records pursuant to section 552.101 of the Government Code in conjunction with section 845.115(a) of the Government Code.

You also assert that portions of the submitted information are confidential under section 815.503(a) of the Government Code. Section 815.503(a) provides as follows:

(a) Records of members, annuitants, retirees, beneficiaries, and alternate payees under retirement plans administered by the retirement system that are in the custody of the system or of an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure, and the retirement system is not required to accept or comply with a request for a record or information about a record or to seek an opinion from the attorney general, because the records are exempt from the public access provisions of Chapter 552 [of the Government Code], except as otherwise provided by this section.

Gov't Code § 815.503(a). Section 815.503(b) provides in part that “[t]he retirement system may release the records . . . to another governmental entity having a legitimate need for the information to perform the purposes of the retirement system[.]” Gov't Code § 815.503(b). Section 815.503(c) provides in part that “[t]he records of a member, annuitant, retiree, beneficiary, or alternate payee remain confidential after release to a person as authorized by this section.” *Id.* § 815.503(c).

You do not indicate to this office that the department maintains any of the submitted records as “an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system.” Gov't Code § 815.503(a). We thus are unable to conclude that the submitted information constitutes “[r]ecords . . . that are in the custody of the system or of an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system.” *Id.* Therefore, section 815.503 does not make any of the submitted information confidential, and none of it may be withheld under section 552.101 of the Government Code on this basis.

You also argue that some of the submitted information is confidential under section 803.402 of the Government Code, which provides, in pertinent part, that “records of members and beneficiaries of a retirement system . . . that are in the custody of any retirement system . . . are confidential and not subject to disclosure and are exempt from the public access provisions of Chapter 552.” Since the submitted information is in the custody of the department, and not the retirement system, section 803.402 is inapplicable. Thus, the department may not withhold any of the submitted information pursuant to section 552.101 in conjunction with section 803.402 of the Government Code

We next note that the submitted documents include W-4 forms. Employee W-4 forms are confidential under section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992). Accordingly, the department must withhold the submitted employee W-4 forms under section 552.101 in conjunction with section 6103(a).

We now turn to your privacy claim. Section 552.102 of the Government Code 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). Section 552.102(a) is generally applicable to information relating to a public official or employee. See Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). 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) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. See *Indus. Found.*, 540 S.W.2d at 683-85. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. 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. 540 S.W.2d at 683.

This office has since concluded that the following types of information also are protected from disclosure under section 552.101 in conjunction with 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 a financial transaction between an individual

and a governmental body, *see* Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history), certain personal choices relating to financial transactions between the individual and the governmental body, *see* Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). After reviewing your arguments and the submitted information, we find that a small portion of it is protected by common-law privacy and therefore must be withheld under section 552.101 of the Government Code. We have marked the information accordingly.

Next, section 552.117(a)(1) of the Government Code 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 request that this information be kept confidential pursuant to section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. The department may not withhold this information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential. After reviewing the submitted information, we conclude that the department must withhold the information it has marked, and the additional information we have marked, under section 552.117, provided the employee whose information is at issue timely elected under section 552.024 to keep this information confidential. We note, however, that a post office box number is not a "home address" for purposes of section 552.117 and therefore may not be withheld under this exception. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality).

Regardless of the applicability of section 552.117, the social security number at issue may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). These amendments make a social security number confidential if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). We

have no basis for concluding that the social security number in question is confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the department, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, the department should ensure that it was not obtained and is not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Next, you have marked information which you claim to be excepted under section 552.130 of the Government Code. Section 552.130 prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code § 552.130.* Accordingly, we agree that the department must withhold the information it has marked pursuant to section 552.130 of the Government Code.

Finally, you assert that a portion of the submitted information is excepted under section 552.139 of the Government Code. This section provides as follows:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Upon review, we determine that the department has not demonstrated that the information it seeks to withhold relates to computer network security or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Furthermore, the department has not demonstrated that the submitted information consists of a computer network vulnerability assessment or report as contemplated in section 552.139(b). Consequently, none of the submitted information is excepted from disclosure under section 552.139.

In summary, we conclude that the department may withhold most of the information it has marked pursuant to section 552.103 to the extent such information has not been seen by the

opposing party to the litigation. For any information that has either been obtained from or provided to the opposing party to the litigation, as well as for the information the department does not seek to withhold under section 552.103, we conclude the following: (1) the department must withhold the information we have marked and the W-4 forms under section 552.101 of the Government Code; (2) the department must withhold the information it has marked, and the additional information we have marked, under section 552.117 if the employee at issue timely elected to keep her information confidential pursuant to section 552.024, and (3) the department must withhold the information it has marked under section 552.130. Finally, the social security number at issue may be confidential under federal law. The remaining information must be released.<sup>1</sup>

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

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<sup>1</sup>Because our ruling is dispositive, we need not address your remaining arguments.

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,



Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/lmt

Ref: ID# 198162

Enc. Submitted documents

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