



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 10, 2004

Mr. David M. Berman
Nichols, Jackson, Dillard, Hagar & Smith, L.L.P.
500 North Akard, Suite 1800
Dallas, Texas 75201

OR2004-3791

Dear Mr. Berman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201260.

The City of Duncanville (the "city"), which you represent, received a request for the following information: (1) the personnel file of a named city manager, (2) the names, addresses, telephone numbers, and resumes of every other candidate who applied for, or was solicited by the City Council, for the city manager position prior to the named individual's employment, (3) any notes or tapes of any executive session wherein the City Council discussed the requirements/qualifications for the city manager position, and their basis for hiring the named individual, (4) any note, memoranda, or other written electronic data which sets forth the signature authority and the expenditure limit imposed on the named individual by the City Council, (5) any note, memoranda, or other written or electronic data limiting, expanding, or setting forth the ability, or lack thereof, for the named individual to authorize the filing of litigation on behalf of the city without prior approval of the City Council, and (6) any expense reports for travel incurred by the named individual in traveling to any country outside the United States on behalf of the city. You state that some responsive information has been or will be released to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.024, 552.101, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

¹ Although you claim that portions of the submitted information are excepted from disclosure pursuant to section 552.024, we note that section 552.117 of the Government Code is the applicable exception to disclosure to claim for this type of information. Accordingly, we address your claim regarding section 552.024 under section 552.117(a)(1) of the Government Code.

² The city submitted records with some of the information blacked out. In the future, the city must submit an unredacted copy of the information in order for this office to properly review the information. See Gov't Code §§ 552.301, .302.

You state that there “is no tape recording” responsive to item three of the request. *See Econ. 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) (governmental body not required to disclose information that did not exist at time request was received). However, you state that the city does have a certified agenda of an executive session that is responsive to the request. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information protected by statute. Section 551.104(c) of the Government Code provides that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order* issued under Subsection (b)(3).” (emphasis added). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). Therefore, the city must withhold the responsive certified agenda of the closed meeting pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

We note that the submitted documents include W-4 forms. Federal tax return information is confidential under section 6103(a) of title 26 of the United States Code. *See* 26 U.S.C. § 6103(a). The term “return information” includes “the nature, source, or amount of income” of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Our office has specifically held that a governmental body must withhold a Form W-4 in its entirety. Open Records Decision No. 600 at 9 (1992). Therefore, the city must withhold the submitted W-4 forms under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

Also, the submitted information includes an Employment Eligibility Verification, Form I-9, governed by section 1324a of title 8 of the United States Code. This statute provides that a 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. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act (the “Act”) would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the submitted Form I-9 may be released only in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses the common-law right to privacy, which 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* 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), 373 (1983) (sources of income not related to financial transaction between individual and governmental body 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 in the submitted documents that is excepted from disclosure under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. 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). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee of the city who requested confidentiality for the information under section 552.024 prior to the date of the city's receipt of the request for information. The city may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the information confidential.

You assert, and provide documentation showing, that the employee whose personnel file is the subject of this request elected prior to the city's receipt of this request not to permit access to his home address, home telephone number, social security number, or information that reveals whether the employee has family members. Thus, you must withhold the information we have marked under section 552.117(a)(1) of the Government Code.³ We note that section 552.117 does not encompass an employee's birth date.

Finally, you argue that a portion of the submitted information is excepted from disclosure under section 552.130 of the Government Code. Section 552.130(a) excepts from disclosure information that relates to: "(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; (2) a motor vehicle title or registration issued by an agency of this state; or (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document." Gov't Code § 552.130(a)(1)-(3). Thus, the city must withhold the Texas driver's license information we have marked pursuant to section 552.130 of the Government Code.

³ As our ruling on this information is dispositive, we do not address your claims under the Social Security Act for the submitted social security numbers.

In summary, the city must withhold the responsive certified agenda of the closed meeting pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. The city must withhold the W-4 forms under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code. The Form I-9 may be released only in compliance with the federal laws and regulations governing the employment verification system. Finally, the city must withhold the information that we have marked pursuant to sections 552.101 in conjunction with the common-law right to privacy, 552.117(a)(1), and 552.130 of the Government Code. To the extent that the city has not already done so, it must release the remaining submitted information 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
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 201260

Enc. Submitted documents

c: Ms. Stacey Alfonso
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Duncanville, Texas 75116
(w/o enclosures)