



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 15, 2004

Mr. Mark G. Mann  
Assistant City Attorney  
City of Garland  
P. O. Box 469002  
Garland, Texas 75046-9002

OR2004-4852

Dear Mr. Mann:

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# 203414.

The City of Garland (the "city") received a request for information related to a named former employee. You claim that portions of the requested information are excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under the Act. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You state and provide documentation showing that you received the original request from the requestor on January 19, 2004. On January 22, 2004, the city asked the requestor to

clarify her request. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body). Thus, the ten-day time period to request a decision under section 552.301(b) was tolled on January 22, 2004. *See* Gov't Code § 552.301(b); Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). The city received the requestor's clarification on March 24, 2004; consequently, the ten-business-day period resumed on March 25. Pursuant to section 552.301(b), you were required to submit your request for a decision from this office by April 2, 2004. You did not submit your request for a decision from this office until April 7, 2004. Consequently, you failed to request a decision within the ten-business-day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely submitted, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open records Decision No. 150 (1997). Because sections 552.101 and 552.117 present compelling reasons for non-disclosure, we will address their applicability to the submitted information.

We first address your claim that section 552.101 is applicable to portions of the 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. We note that the submitted information contains Form W-4s. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). We determine that the submitted Form W-4s are tax return information and therefore excepted from disclosure under section 552.101 as information made confidential by federal law.

Section 552.101 also encompasses the doctrine of common law privacy. Information is protected under the common law right to privacy when (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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The common law right to privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

Common law privacy under section 552.101 also encompasses certain types of personal financial information. This office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, but 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 Nos. 600 at 9-12 (1992) (identifying public and private portions of state employees' personnel records), 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common law privacy. *See, e.g.,* Open Records Decision Nos. 600 at 9-12 (1992) (participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, an employee's designation of a retirement beneficiary, choice of optional insurance coverage, decision regarding the direct deposit of compensation and the forms that allow allocation of pretax compensation to group insurance, health care or dependent care are all excepted from disclosure under the common law right to privacy. *See* Open Records Decision No. 600 at 9-12 (1992). However, where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not protected by common law privacy. *Id.* at 9. Having reviewed the submitted information, we have determined that some of the information, which you have highlighted, including the named former employee's election of whether to directly deposit his payroll check into his personal bank account and whether to participate in the city's "Employee Club," is excepted from disclosure under section 552.101 in conjunction with the common law right to privacy. You have also highlighted some other types of information that we agree must be withheld under section 552.101 in conjunction with the common law right to privacy. Additionally, we have marked some additional information that the city must withhold under section 552.101 in conjunction with common law privacy. We note, however, that a small amount of the information you have highlighted is not confidential under the common law right to privacy and it is not otherwise excepted from disclosure

under any other provision of the Act. We have marked the highlighted information that you must release.

You assert that portions of the submitted information are excepted under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. If the named former employee is a peace officer as defined by article 2.12 of the Code of Criminal Procedure, you must withhold the information you have highlighted, plus some additional information we have marked, under section 552.117(a)(2). However, if he is not a peace officer as defined by article 2.12 of the Code of Criminal Procedure, then section 552.117(a)(2) is not applicable.

However, we note that section 552.117(a)(1) makes confidential the same types of information covered by section 552.117(a)(2) but for current and former employees of governmental bodies who request that this information be kept confidential under section 552.024. Therefore, section 552.117(a)(1) requires the city to withhold the home address, home telephone number, social security number, and family member information of the named former employee if he has submitted a timely election under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). We note, however, that you have highlighted a small amount of information, specifically the named former employee's date and place of birth, that cannot be withheld under section 552.117 or under any other exception to disclosure. We have marked this information that cannot be withheld and must be released.

Regardless of the applicability of section 552.117, social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. 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 Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

We also note that you have marked information related to a Texas driver's license. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license number that you have highlighted under section 552.130. Additionally, we have marked additional information on that document that must be withheld under section 552.130.

In summary, the Form W-4s must be withheld under section 552.101 in conjunction with federal law. The information you have highlighted and the additional information we have marked must be withheld under section 552.101 in conjunction with the common law right to privacy. Pursuant to section 552.117(a)(2), you must withhold the present and former home addresses and telephone numbers, social security number, and family member information that you have highlighted, plus the additional information we have marked, of the named former employee if he is a licensed peace officer. In the alternative, pursuant to section 552.117(a)(1), you must withhold the same information for him if he was not a licensed peace officer at the time this request was received but he elected, prior to the receipt of this request, to keep such information confidential. Regardless of the applicability of section 552.117, prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990. You must withhold the Texas driver's license information you have highlighted and that we have marked under section 552.130. All other information must be released.

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,



Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/krl

Ref: ID# 203414

Enc. Submitted documents

c: Ms. Sophia Graham  
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(w/o enclosures)