



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2004

Mr. David K. Walker
County Attorney
Montgomery County
210 West Davis, Suite 400
Conroe, Texas 77301

OR2004-5765

Dear Mr. Walker:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205073.

The County of Montgomery (the "county") received a request for the personnel files and other related information for four named employees. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.115, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we consider your argument that the county is not required to provide the requestor with the requested cease and desist order. You indicate that the county does not maintain a copy of the order and is not required to obtain the order from the Montgomery County District Attorney in order to respond to the request for information. We agree and conclude that the county need not obtain or provide the order to the requestor. *See Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989).*¹

We next address the county's claim that Exhibits H and I are excepted from release under section 552.103 of the Government Code. This section provides as follows:

¹Because we reach this conclusion, we need not address your other arguments regarding the order.

(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 county 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 county must meet both prongs of this test for information to be excepted under 552.103(a).

The county generally contends that it anticipates civil litigation to which the requested information relates. However, the county has not provided this office with the concrete evidence necessary to show that the claim that civil litigation may ensue is more than mere conjecture. *See* Open Records Decisions No. 452 at 4 (1986). The county also represents to this office that the requested information relates to anticipated criminal prosecutions of two county employees. The county indicates that the prosecutions were anticipated when it received this request for information. In such a situation, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. Exhibit E contains an affidavit from an Assistant District Attorney for Montgomery County (the "district attorney") which indicates that the district attorney reasonably anticipates criminal prosecution of one county employee. Thus, we find the district attorney to have been a party to the anticipated prosecution of that employee on the date the county received the request for information. Because the district attorney wants Exhibits H and I withheld from disclosure, and these exhibits relate to the district attorney's anticipated criminal prosecution, we find that section 552.103 is applicable to Exhibits H and I.

However, once that 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been

obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We note that Exhibit I has been seen by the potential defendant in the anticipated criminal prosecution, and thus the county may not withhold this exhibit from disclosure under section 552.103. The county, however, may withhold Exhibit H under section 552.103. The applicability of section 552.103(a) ends once the criminal litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that Exhibits I and K contain W-4 forms. 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, including section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) 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 Internal Revenue Service 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). This office has specifically held that W-4 forms must be withheld in their entirety. See ORD 600 at 9. Accordingly, the submitted W-4 forms must be withheld under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

You claim that portions of the submitted information in Exhibits J and K are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 845.115(a) of the Government Code. Section 845.115(a) protects certain information contained in records that are in the custody of the Texas County and District Retirement System (the "retirement system") concerning an individual member, retiree, annuitant, or beneficiary. See Gov't Code § 845.115(a). We note, however, that the documents at issue in Exhibits J and K are in the custody of the county, not the retirement system. Accordingly, we conclude that the county may not withhold any of the submitted retirement system records pursuant to section 552.101 of the Government Code in conjunction with section 845.115(a) of the Government Code.

We next address your privacy claims under sections 552.101 and 552.102. 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* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims 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. *Id.* at 685. Employee privacy under section 552.102 is significantly narrower than common law privacy under section 552.101, however, because of the greater public interest in the disclosure of information relating to public employees. *See* Open Records Decision Nos. 470 (1987), 444 (1986), 423 (1984). Generally, section 552.102 protects only that information that reveals "intimate details of a highly personal nature." *See* Open Records Decision No. 315 (1982).

This office has found that the following types of information are 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), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: personal financial information not relating to the 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). Exhibit I is the personnel file of a living individual. Having reviewed Exhibit I, we have marked the personal financial information that must be withheld under sections 552.101 and 552.102 in conjunction with common law privacy.

Exhibits J and K are the personnel files of deceased individuals. We note that the right of privacy is purely personal and lapses upon death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). We therefore conclude that the deceased individuals' privacy rights in their personnel files has lapsed and so these files may not be withheld on the basis of protecting the deceased individuals' privacy. However, if the release of information about a deceased person reveals highly intimate or embarrassing information about living persons in which there is no legitimate public interest, then the information must be withheld under common law privacy. *See* Attorney General Opinion

JM-229. Living beneficiaries of a deceased employee have a common law right of privacy in certain financial information. *See* Open Records Decision No. 373 at 3. Accordingly, to the extent Exhibits J and K reveal the identity of a currently designated beneficiary, that identifying information must be withheld pursuant to common law privacy to protect the beneficiary's privacy interests. Accordingly, we have marked the information which relates to living beneficiaries. This information must be withheld under section 552.101 in conjunction with common law privacy.

You claim that the birth certificates in Exhibits J and K are excepted from release under section 552.115. This section provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that "a birth record is public information and available to the public on and after the 75th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official." Since section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration official, the county may not withhold certificates of birth registration obtained from its personnel files pursuant to that provision. *See* Open Records Decision No. 338 (1982).

Section 552.117 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. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). In this instance, you have submitted documents in Exhibit G which show that the individuals who are the subjects Exhibits I and K timely elected under section 552.024 to withhold their home addresses and telephone numbers. Thus, you must withhold these individuals' home addresses and telephone numbers, which we have marked, under section 552.117. We note, however, that a post office box number is not considered 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 Gov't Code § 552.117 is to protect public employees from being harassed *at home*).

We note the presence of social security numbers, which 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 submitted information 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 note that Exhibit J contains the social security numbers of deceased individuals. The federal Social Security Act protects privacy interests. As privacy rights

lapse upon death, the county may not withhold the social security numbers of any deceased individuals under section 552.101 in conjunction with the federal Social Security Act. *See* Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers of any individuals, you should ensure that no such information was obtained or is maintained by the county pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, you claim the Texas drivers' license information in Exhibits J and K must be withheld under section 552.130. This section 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[.]

Section 552.130 is designed to protect the privacy interests of an individual; however, an individual's privacy interests expire upon death. Accordingly, the Texas drivers' license numbers in Exhibits J and K, which belong to deceased individuals, may not be withheld under section 552.130.

In summary, you may withhold Exhibit H under section 552.103. You must withhold the W-4 forms under section 552.101 in conjunction with section 6103 of title 26 of the United States Code. The marked personal financial information in Exhibit I must be withheld under sections 552.101 and 552.102. The marked information in Exhibit K which relates to living beneficiaries must be withheld under section 552.101 in conjunction with common law privacy. The personal information in Exhibits I and J, which we have marked, must be withheld under section 552.117. The social security numbers of living individuals may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act. The remaining 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,



W. David Floyd
Assistant Attorney General
Open Records Division

WDF/sdk

Ref: ID# 205073

Enc. Submitted documents

c: Mr. Stephen Jackson
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(w/o enclosures)