



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2004

Ms. Christy Drake-Adams
Bickerstaff, Heath, Smiley, Pollan, Keever & McDaniel, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701

OR2004-7061

Dear Ms. Drake-Adams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 207672.

The Barton Springs/Edwards Aquifer Conservation District (the "district"), which you represent, received a request for the personnel file of a former district general manager. You state that the district has provided the requestor with some of the requested information. You claim that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.101, 552.102, 552.117, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that portions of the submitted information are excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102(a) 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 excepted from disclosure under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure by the common-law right to privacy as incorporated by section 552.101 of the Government Code. *See also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we address the district's

section 552.102 claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.¹

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. *See id.* at 683. This office has since concluded that other types of information also are protected from disclosure by the common-law right to privacy. *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 a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). Prior decisions of this office have also 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, e.g.,* 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).

Based on your arguments and our review of the submitted information, we find that portions of this information are protected from disclosure by the common-law right to privacy. Accordingly, we conclude that the district must withhold the information that we have marked pursuant to sections 552.101 and 552.102 of the Government Code in conjunction with the common-law right to privacy. However, we also find that no other portion of the submitted information is protected from disclosure by the common-law right to privacy. Accordingly, we conclude that the district may not withhold any other portion of the submitted information under sections 552.101 and 552.102 in conjunction with the common-law right to privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983)

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

(statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy).

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal statute. Section 552.101 also encompasses information that is protected from disclosure by other statutes. We note that 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 the I-9 form that we have marked in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the district may only release this marked I-9 form in compliance with the federal laws and regulations governing the employment verification system.

You also claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); *see also* Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), dismissed in part, *aff'd* in part, vacated in part, and remanded, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments... or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return... or the determination of the existence, or possible existence, of liability... for any tax,... penalty,..., or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Based on your arguments and our review of the remaining submitted information, we conclude that the district must withhold the information that we have marked pursuant to section 552.101 in conjunction with section 6103 of title 26 of the United States Code.

In addition, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of a current or former employee of a governmental body who timely requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). The determination of whether a particular item of information is excepted from disclosure under section 552.117(a)(1) must be made as of the date of the governmental body's receipt of the request for information. *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 who requested confidentiality under section 552.024 for the information prior to the district's receipt of this request for information. Information may not be withheld by the district under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely request for confidentiality for such information under section 552.024. You indicate, and provide documentation showing, that the former district employee who is the subject of this request requested confidentiality for all of her section 552.117 information prior to the date that the district received this request for information. Accordingly, we conclude that the district must withhold the information that we have marked pursuant to section 552.117(a)(1) of the Government Code.

Further, you claim that a portion of the remaining submitted information is excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 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). Based on your arguments and our review of the remaining submitted information, we conclude that the district must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code.

You also claim that a portion of the remaining submitted information is excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, we conclude that the district must withhold the bank account number that we have marked pursuant to section 552.136 of the Government Code.

Finally, we note that an e-mail address contained within the remaining submitted information is excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

(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.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain email 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 your representations and our review of the remaining submitted information, we

have marked the e-mail address that is excepted from disclosure under section 552.137(a). You state that the individual with whom this address is associated has not consented to its release. Accordingly, we conclude that the district must withhold this marked address pursuant to section 552.137(a) of the Government Code.

In summary, the district must withhold the information that we have marked pursuant to sections 552.101 and 552.102 in conjunction with the common-law right to privacy. The district may only release the I-9 form that we have marked in compliance with the federal laws and regulations governing the employment verification system. The district must withhold the W-4 forms that we have marked pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. The district must withhold the information that we have marked pursuant to sections 552.117(a)(1), 552.130, 552.136, and 552.137 of the Government Code. The district 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).

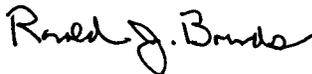
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 207672

Enc. Marked documents

c: Mr. Jim Camp
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(w/o enclosures)