



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2004

Mr. James M. Frazier III
Assistant General Counsel
Texas Department of Criminal Justice
P. O. Box 4004
Huntsville, Texas 77342-4004

OR2004-10676

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215065.

The Texas Department of Criminal Justice (the "department") received a request for twelve categories of information pertaining to a specified individual. You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.102, 552.117, 552.130, 552.134, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we must address the procedural requirements of section 552.301 of the Government Code. We note that section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general 1) a copy of the written request for information, 2) a signed statement as to the date on which the request was received by the governmental body or evidence

¹ We note that although the department did not claim that any portion of the requested information is excepted from disclosure under section 552.136 of the Government Code within ten business days of its receipt of the request for information, we will consider the department's claim under this exception to disclosure since such a claim constitutes a compelling interest that is sufficient to overcome any existing presumption that the portions of the requested information to which this claim pertains are now public. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision Nos. 150 at 2 (1977), 319 (1982).

sufficient to establish that date, 3) written comments stating the reasons why the stated exceptions apply that would allow the information at issue to be withheld from disclosure, and 4) a copy of the specific information requested or representative samples of it, labeled to indicate which exceptions to disclosure apply to which parts of the documents. *See id.* § 552.301(e). In this regard, we note that the department failed to provide us with portions of the submitted information within fifteen business days of its receipt of the request. Thus, we find that the department failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision from us.

Because the department failed to comply with the procedural requirements of section 552.301 in requesting this decision, the information at issue is now presumed public. *See Gov't Code § 552.302; see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d No. 319 (1982). The department must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third party interests are at stake. *See Open Records Decision No. 150 at 2 (1977)*. Because the department's claims under sections 552.101 and 552.136 of the Government Code with regard to the information at issue constitute such compelling interests, we will address these claims.

You claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal statutes.² 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 department may only release this marked I-9 form in compliance with the federal laws and regulations governing the employment verification system. In addition, you claim that a W-4 form that is contained within the submitted information is confidential under section 6103(a) of Title 26 of the United States Code. Section 6103(a) provides that tax return information is confidential. *See 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); see also Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981)*. Accordingly, we conclude that the department must withhold the W-4 form that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

² 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 other statutes.

You also claim that portions of the remaining 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.³ *See also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we address the department's section 552.102 claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

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 remaining submitted information, we find that the portions of this information that we have

³ Section 552.101 also encompasses information that is protected from disclosure by the common-law right to privacy.

marked are excepted from disclosure pursuant to sections 552.101 and 552.102 in conjunction with the common-law right to privacy.

In addition, you claim that a portion of the remaining submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with the constitutional right to privacy.⁴ We note that the constitutional right to privacy encompasses two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See* Open Records Decision No. 455 at 4 (1987). The first type of constitutional privacy protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *See id.* The scope of information protected by constitutional privacy is narrower than that under the doctrine of common-law privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After carefully considering your arguments and reviewing the remaining submitted information, we find that no portion of this information is protected from disclosure by the constitutional right to privacy. Accordingly, we conclude that the department may not withhold any portion of the remaining submitted information under section 552.101 of the Government Code on that basis.

Further, 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)(3) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(3). Based on your arguments and our review of the remaining submitted information, we have marked the information that the department must withhold pursuant to section 552.117(a)(3) of the Government Code.

You also claim that portions of the remaining submitted information are 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

⁴ Section 552.101 also encompasses information that is protected from disclosure by the constitutional right to privacy.

information, we conclude that the department must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code.

You also claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.134 of the Government Code. Section 552.134(a) provides:

- (a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Based on your arguments and our review of the remaining submitted information, we find that the information that we have marked concerns inmates confined in a facility operated by the department. Section 552.029 of the Government Code does not apply to this information. Accordingly, we conclude that the department must withhold this particular marked information pursuant to section 552.134 of the Government Code.

Finally, you 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. Based on your representations and our review of the information at issue, we conclude that the department must withhold the bank account number that we have marked pursuant to section 552.136 of the Government Code.

In summary, the department 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 department must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and the common-law right to privacy. The department must also withhold the information that we have marked pursuant to sections 552.117(a)(3), 552.130, 552.134, and 552.136 of the Government Code. The department 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# 215065

Enc. Marked documents

c: Ms. Yolanda M. Torres
Attorney at Law
P. O. Box 515
Huntsville, Texas 77342-0515
(w/o enclosures)