



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 18, 2005

Ms. Amy D. Smith
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2005-09448

Dear Ms. Smith:

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# 234355.

The Texas Department of Criminal Justice (the "department") received a request for eleven categories of information related to a named department employee. You indicate that the department will be releasing most of the requested information, but you claim that the submitted information is excepted from disclosure under sections 552.101, 552.122, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. 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

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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 submitted Form I-9 would be “for purposes other than for enforcement” of the applicable federal law. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the department must withhold the Form I-9 under section 552.101 in conjunction with section 1324a of title 8 of the United States Code.

A W-2 or W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term “return information” includes “the nature, source, or amount of income” of a taxpayer. 26 U.S.C. § 6103(b)(2). The submitted W-2 and W-4 forms must be withheld under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses the common law right to privacy. Common law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The common law right to privacy protects certain types of personal financial information. This office has determined that financial information that relates 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, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common law privacy to generally be those regarding 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). We have marked personal financial information that the department must withhold under section 552.101 of the Government Code in conjunction with common law privacy. As our ruling is dispositive for this information, we need not address your remaining arguments for withholding this information.

Next, we address your arguments under section 552.122 of the Government Code. Section 552.122 excepts from required public disclosure “a test item developed by a . . . governmental body[.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope

of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994).

You seek to withhold interview questions 1 through 4, as well as the model and actual answers to those questions, under section 552.122. Based on your representations and our review of the information at issue, we find that questions 1, 2, and 3 qualify as test items under section 552.122(b). We also find that the release of the model or actual answers to these questions would tend to reveal the questions themselves. We therefore conclude that the department may withhold questions 1, 2, and 3, along with the submitted model and actual answers to those questions under section 552.122. We find, however, that question 4 is a general question evaluating an applicant’s subjective ability to respond to a particular situation, and does not test any specific knowledge of an applicant. Accordingly, question 4, along with the submitted model and actual answer to that question, may not be withheld under section 552.122 of the Government Code.

Next, we address your claim under section 552.137 of the Government Code. This section excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail address we have marked does not appear to be of a type specifically excluded by section 552.137(c). Therefore, the department must withhold this e-mail address in accordance with section 552.137 unless the department receives consent for its release.

We note that the submitted documents contain information that is excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(3) excepts from public disclosure the home addresses, home telephone numbers, social security numbers, and family member information of current and former employees of the department, regardless of whether the employees complied with section 552.1175.² We have marked the information that the department must withhold under this exception.

In summary, the department must withhold the Form I-9, as well as the W-2 and W-4 forms, pursuant to section 552.101 of the Government Code in conjunction with federal law. The department must also withhold the personal financial information we have marked under section 552.101 in conjunction with common law privacy. The department may withhold questions 1, 2, and 3, along with the submitted model and actual answers to those questions

²We note that Open Records Letter No. 2005-1067(2005) was issued and serves as a previous determination for this type of information maintained by the department.

under section 552.122. The department must withhold the e-mail address we have marked under section 552.137 of the Government Code. The department must also withhold the information we have marked under section 552.117(a)(3). The remaining information must be released 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,

A handwritten signature in black ink, appearing to read 'James A. Person III', written over a horizontal line.

James A. Person III
Assistant Attorney General
Open Records Division

JAP/sdk

Ref: ID# 234355

Enc. Submitted documents

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