



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2009

Ms. Paige H. Saenz
Attorney for City of Kyle
Knight & Partners
Executive Office Terrace
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2009-06043

Dear Ms. Saenz:

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# 342600.

The City of Kyle (the "city"), which you represent, received a request for any "employment records and reports" pertaining to a named former city employee. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant

¹To the extent additional responsive information existed on the date the city received the instant request, we assume that information has been released to the requestor. If the city has not released any such information, it must do so at this time. See Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). Under section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You state the city received the request on February 3, 2009. Thus, the ten-day-deadline was February 18, 2009, and the fifteen-day deadline was February 25, 2009. However, the city's request for a ruling, arguments explaining the claimed exceptions, and submitted responsive information received by this office were postmarked March 4, 2009. You state, and provide documentation showing, that initially the city timely mailed the documents specified by section 552.301, but inadvertently sent them to an incorrect address. Section 552.308 of the Government Code provides in pertinent part:

(a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period . . . the requirement is met if the document is sent to the person by first class United States mail *properly addressed* with postage prepaid and:

(1) it bears a post office cancellation mark indicating a time within that period; or

(2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail within that period.

Id. § 552.308(a) (emphasis added). Because the city's initial submission was improperly addressed, it was not received by this office by either of the mandated deadlines and, thus, it did not meet the elements of timeliness established by section 552.308. Therefore, we conclude that the city failed to comply with section 552.301 of the Government Code.

A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Because sections 552.101, 552.117, 552.130, and 552.136 can provide compelling reasons to

withhold information, we will address your arguments against disclosure of the submitted information.

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes. This office has held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as a taxpayer’s “identity, the nature, source, or amount of income.” See 26 U.S.C. § 6103(b)(2)(A). 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), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Consequently, the city must withhold the W-4 form submitted as Exhibit B pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses section 1324a of title 8 of the United States Code. This section provides that an Employment Eligibility Verification I-9 Form “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 information submitted as Exhibit D is an I-9 form. Release of this document in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we find that the submitted I-9 form is confidential under section 1324a of title 8 of the United States Code and must only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. See Open Records Decision Nos. 600 (1992) (employee’s designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find portions of the remaining information, which we have

marked, constitute personal financial information. Furthermore, we find that this information is not of legitimate concern to the public. Therefore, the city must withhold the marked information under section 552.101 in conjunction with common-law privacy.

Section 552.117 of the Government Code excepts from public disclosure the present and former 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. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The submitted information demonstrates that the former employee at issue elected to keep such information confidential prior to the receipt of this request. Therefore, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

Section 552.130 excepts from disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. Accordingly, the city must withhold the Texas driver's license information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code states that "[n]otwithstanding 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." *Id.* § 552.136. Therefore, the city must withhold the procurement card number we marked under section 552.136 of the Government Code.

In summary, the city must withhold (1) the W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, (2) the I-9 form under section 552.101 in conjunction with section 1324a of title 8 of the United States Code, (3) the information marked under section 552.101 in conjunction with common-law privacy, (4) the information marked under section 552.117(a)(1) of the Government Code, (5) the information marked under section 552.130 of the Government Code, and (6) the information marked under section 552.136 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free,

at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "MA 6T", is positioned above the typed name.

Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/dls

Ref: ID# 342600

Enc. Submitted documents

c: Requestor
(w/o enclosures)