



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 12, 2009

Mr. Joe Torres III
City Attorney
City of Alice
216 North Texas Boulevard, Suite 2
Alice, Texas 78332

OR2009-16090

Dear Mr. Torres:

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# 361342.

The City of Alice (the "city"), which you represent, received a request for the city manager's personnel file, application and/or résumé, employment contract, and salary agreement. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.136, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have not submitted any information responsive to the request for the city manager's employment contract. To the extent any information responsive to this aspect of the request existed on the date the city received this request, we assume you have released it. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No.664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

¹ You also cite section 552.108(5)(a), stating the information may implicate an individual's privacy rights. We note, however, that section 552.108 protects a governmental body's law enforcement interests, and furthermore contains no such subsection.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 6103(a) of title 26 of the United States Code. Prior decisions of this office have 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 Nos. 600 (1992) (W-4 forms). 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). 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). Accordingly, the city must withhold the W-4 form we have marked pursuant to federal law.

We note some of the remaining information consists of criminal history record information ("CHRI").² Section 552.101 also encompasses chapter 411 of the Government Code, which deems confidential criminal history record information ("CHRI") generated by the National Crime Information Center or the Texas Crime Information Center. *Id.* § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. See *id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. See Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. See generally *id.* §§ 411.090-.1409. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. See ORD 565. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. The remaining submitted information contains CHRI that is confidential under section 411.083.

² The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Accordingly, this information, which we have marked, is excepted from required public disclosure by section 552.101 of the Government Code.

You claim the remaining personnel records are confidential pursuant to the doctrine of common-law privacy and section 552.102 of the Government Code.³ Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from public 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 is applicable to information that relates to public officials and employees. *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). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, *writ ref’d n.r.e.*) (addressing statutory predecessor). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information 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 demonstrated. *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 excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include 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), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review of the remaining personnel records, we find that some of the information, including optional insurance coverage, beneficiary designation, and direct deposit authorization, constitutes personal financial information. We also find that this information is not of legitimate public concern. Thus, the city must withhold the information we have marked in the remaining personnel records under common-law privacy. You have failed to demonstrate, however, how any of the remaining information constitutes highly intimate or embarrassing information of no legitimate public concern. Therefore, no portion of the remaining information may be withheld under either section 552.101 or section 552.102 in conjunction with common-law privacy.

³ Although you cite to section 552.102(b)(1), we will consider your argument under section 552.102(a), as that is the proper exception to raise for this information.

You assert portions of the remaining information are protected under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current 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 of the Government Code. Gov't Code § 552.117(a)(1). We note that an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at *home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985)) (emphasis added). Whether 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). Pursuant to section 552.117(a)(1), the city must withhold the personal information that pertains to a current or former employee of the city who elected, prior to the city's receipt of the request for information, to keep such information confidential. You inform us, and provide documentation showing, that the city manager whose information is at issue chose to not allow public access to his personal information prior to the city's receipt of the request for information. Therefore, the city must withhold the information we have marked in the remaining personnel records pursuant to section 552.117(a)(1) of the Government Code.

We note that some of the remaining information is protected by section 552.130, which excepts from disclosure information that "relates to ... a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). Therefore, the city must withhold the Texas driver's license information that 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." Gov't Code § 552.136(b). An access device number is one that 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, and includes an account number. *Id.* § 552.136(a). Upon review, we find you have failed to demonstrate how any of the remaining information is a credit card, debit card, charge card, or access device number for the purpose of section 552.136 of the Government Code. Thus, none of the remaining information may be withheld on that basis.

Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c). The e-mail address we have marked is not a type specifically excluded by section 552.137(c) of the Government Code. Therefore, the city must withhold the marked e-mail address in

accordance with section 552.137 unless the owner of the e-mail address has consented to its release.

In summary, the city must withhold under section 552.101, the W-4 form we have marked in conjunction with section 6103(a) of title 26 of the United States Code, the CHRI we have marked in conjunction with section 411.083, and the financial information we have marked in conjunction with common-law privacy. The city must withhold the employee's personal information we have marked pursuant to section 552.117(a)(1) of the Government Code. The city must withhold the Texas driver's license information that we have marked under section 552.130 of the Government Code. The city must withhold the email address we have marked under section 552.137 of the Government Code unless the owner of the e-mail address has consented to its release. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/rl

Ref: ID# 361342

Enc. Submitted documents

c: Requestor
(w/o enclosures)