



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2010

Mr. Ian M. Steusloff
Assistant General Counsel
Texas Ethics Commission
P.O. Box 12070, Capitol Station
Austin, Texas 78711-2070

OR2010-02787

Dear Mr. Steusloff:

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# 371164.

The Texas Ethics Commission (the "commission") received a request for a specified employee's personnel file and the cost for travel expenses to a specified location. You indicate you do not have any of the information regarding the requested travel expenses.¹ You state that you have released a portion of the requested information. You also state that the commission will withhold certain information pursuant to section 552.024 of the Government Code.² You further state you have redacted social security numbers pursuant

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Section 552.024(c) authorizes a governmental body to withhold information relating to a current or former official or employee of the governmental body that is subject to section 552.117 of the Government Code without requesting a decision by this office, if the official or employee chooses not to allow public access to the information.

to section 552.147 of the Government Code.³ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.111, 552.116, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed 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. This exception encompasses information that is made confidential by statute. You claim that the submitted information in Exhibit E is confidential under section 231.108 of the Family Code. This section provides as follows:

(a) Except as provided by Subsection (c), all files and records of services provided under [chapter 231 of the Family Code], including information concerning a custodial parent, noncustodial parent, child, and an alleged or presumed father, are confidential.

(b) Except as provided by Subsection (c), all communication made by a recipient of financial assistance under Chapter 31, Human Resources Code, or an applicant for or recipient of services under this chapter are privileged.

(c) The Title IV-D agency may use or release information from the files and records, including information that results from a communication made by a recipient of financial assistance under Chapter 31, Human Resources Code, or by an applicant for or recipient of services under this chapter, for purposes directly connected with the administration of the child support, paternity determination, parent locator, or aid to families with dependent children programs. The Title IV-D agency may release information from the files and records to a consumer reporting agency in accordance with Section 231.114.

(d) The Title IV-D agency by rule may provide for the release of information to public officials.

(e) The Title IV-D agency may not release information on the physical location of a person if:

(1) a protective order has been entered with respect to the person; or

(2) there is reason to believe that the release of information may result in emotional or physical harm to the person.

³Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. See Gov't Code § 552.147(b).

(f) The Title IV-D agency, by rule, may provide for the release of information to persons for purposes not prohibited by federal law.

(g) The final order in a suit adjudicating parentage is available for public inspection as provided by Section 160.633.

Fam. Code § 231.108; *see also* 42 U.S.C. § 654(26) (state plan for child and spousal support must have in effect safeguards, applicable to all information handled by State agency, that are designed to protect privacy rights of parties); Open Records Decision No. 417 at 4 (1984) (records relating to recipients of child support collection services are confidential).

Chapter 231 of the Texas Family Code governs the administration of the Title IV-D child support programs. The Office of the Attorney General (the "OAG") is the legislatively-designated Title IV-D agency under chapter 231. *See* Fam. Code § 231.001. The suspension of licenses in Title IV-D cases is a federally-mandated IV-D enforcement function. *See* Fam. Code § 231.001 *et seq.*; *see also* 42 U.S.C. § 654(20) (to extent required by 42 U.S.C. § 666, state shall have in effect laws to improve child support enforcement effectiveness referred to in that section), 666(16) (addressing authority to withhold or suspend licenses).

In this instance, you state that the submitted information in Exhibit E was sent to the commission by the OAG. You indicate that the commission uses this information for the administration and enforcement of a child support program. *See id.* § 231.108(c) (allowing the OAG to release information subject to chapter 231 programs). Based on your arguments and our review of the information at issue, we conclude that the commission must withhold the submitted information in Exhibit E pursuant to section 552.101 of the Government Code in conjunction with section 231.108 of the Family Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code 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). 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 the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the commission's section 552.102(a) claim in conjunction with its common-law privacy claim under 552.101 of the Government Code.

In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure 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. 540 S.W.2d at 685. The types of information considered intimate and

embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. *Id.* at 683. 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). In addition, this office has found certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Thus, the commission must withhold this information under 552.101 of the Government Code in conjunction with the common-law right of privacy.⁴ However, no portion of the remaining information is either highly intimate or embarrassing and of no legitimate public concern. Accordingly, no portion of the remaining information in those exhibits may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, 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 with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, 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), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Accordingly, the commission must withhold the submitted W-4 forms in Exhibit F that you 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. However,

⁴As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

we find that the remaining information you have marked does not constitute tax return information and may not be withheld under section 552.101 on that basis.

You also mark information confidential under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 and “any information contained in or appended to such 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). You have marked an I-9 form and the appended identification forms. Based on our review, we find the commission must withhold the I-9 form and its attachments in Exhibit F that you have marked under 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.⁵

Section 552.101 also encompasses section 651.007 of the Government Code, which provides in relevant part as follows:

(b) Each state agency shall conduct an exit interview with an employee who leaves employment with the agency. The state agency shall conduct the exit interview by having the employee access the questionnaire posted on the state auditors Internet site and electronically submit the completed questionnaire to the state auditor.

...

(g) The responses to an exit interview questionnaire are confidential and not subject to disclosure under Chapter 552. The responses may be disclosed only to a law enforcement agency in a criminal investigation or on order of a court.

Gov't Code § 651.007(b), (g). Upon review, we find that Exhibit G does not contain responses to an exit survey. Therefore, the commission may not withhold any portion of Exhibit G under section 552.101 in conjunction with section 651.007(g).

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov't Code § 552.111. This section encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). In Open Records Decision No. 615, this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the

⁵As our ruling for this information is dispositive, we need not address your remaining arguments regarding this information.

policymaking processes of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). The purpose of section 552.111 is “to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.).

An agency’s policymaking functions do not encompass internal administrative or personnel matters. Disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See* ORD 615 at 5-6. However, a governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, a preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 at 2 (1990). Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You assert that the information in Exhibit H relates to the commission’s broad personnel policies and reflects the commission’s deliberative process. However, upon review, we find that the information at issue pertains to an administrative and personnel matter that does not reveal advice, opinions, or recommendations about policymaking decisions. Therefore, the commission may not withhold any portion of Exhibit H under section 552.111 of the Government Code.

Section 552.116 of the Government Code provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure under the Act]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You generally claim that the unique identifier you have marked in Exhibit G is excepted from disclosure under section 552.116. Upon review, however, we find you have failed to demonstrate how the information you have marked consists of information "prepared or maintained in conducting an audit or preparing an audit report" within the meaning of section 552.116(b)(2). Accordingly, we conclude that the commission may not withhold the unique identifier you have marked in Exhibit G under section 552.116 of the Government Code.

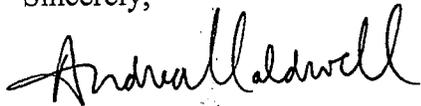
In summary, the commission must withhold: (1) the information in Exhibit E under section 552.101 of the Government Code in conjunction with section 231.108 of the Family Code; (2) the information we have marked under section 552.101 of the Government Code in conjunction with the common-law right of privacy; (3) the submitted W-4 forms in Exhibit F that you 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 (4) the I-9 form and its attachments in Exhibit F that you have marked under 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.⁶ The remaining information must be released.

⁶We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, Form I-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code and direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy, without the necessity of requesting an attorney general decision.

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,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 371164

Enc. Submitted documents

c: Requestor
(w/o enclosures)