



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 28, 2010

Mr. Gary Henrichson
Assistant City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR2010-11345

Dear Mr. Henrichson:

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# 388414 (McAllen #s W002607-051210, W002608-051210, W002609-051210, and W002612-051310).

The City of McAllen (the "city") received four requests for the personnel file of a named city employee, all contracts with that employee effective or signed during a specified time period, correspondence between the employee and the city manager or mayor, and all audit reports and related documentation regarding two international bridges conducted during a specified time period. You state there are no contracts signed by the employee during the specified time period and no correspondence between that employee and the mayor.¹ You state you have released the audit reports and related correspondence regarding the bridges. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.115, 552.117, 552.130, and 552.136 of the Government Code.² 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

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²You inform us the city withdraws the remaining exceptions to disclosure it raised in its letter dated May 25, 2010.

Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 6103(a) of title 26 of the United States Code, which 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[.]” 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). Thus, the city must withhold the W-4 form 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.

Section 552.101 also encompasses the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d–1320d-9. You claim a portion of the submitted information, which you have marked, is protected under HIPAA. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. See Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); see also Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. See 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. See *id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. See 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” See ORD 681 at 8; see also Gov’t Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. See *Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; see also Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information subject to disclosure under the Act confidential, the city may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Section 552.101 also encompasses the doctrine of common-law privacy. 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.” See 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 Bd.*, 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 city's common-law privacy claim under sections 552.101 and 552.102(a) of the Government Code together.

Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found 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). Additionally, this office has found some 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) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature"). Upon review, we find a portion of the remaining information, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.102(a) of the Government Code. The city has failed to demonstrate, however, that any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold any portion of the remaining information on the basis of common-law privacy or under section 552.102 of the Government Code.

Although you generally assert a portion of the remaining information, which you have marked under section 552.101, is confidential by law, you have not directed our attention

to any confidentiality provision, nor are we aware of any, that would make the information at issue confidential under section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the city may not withhold any portion of the remaining information under section 552.101 of the Government Code.

You raise section 552.115 of the Government Code for the submitted birth certificate. Section 552.115 excepts from disclosure “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]” Gov’t Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration officials. *See* Open Records Decision No. 338 (1982) (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration officials). Because section 552.115 does not apply to information held by the city, the submitted birth certificate may not be withheld on this basis.

You raise section 552.117 of the Government Code for a portion of the remaining information. 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). 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 provide a copy of the employee’s election of privacy form in which the employee timely requested confidentiality of his home address and home telephone number under section 552.024. Therefore, the city must withhold the employee’s home address and home telephone number pursuant to section 552.117(a)(1) of the Government Code. We note you also seek to withhold the employee’s social security number, family member information, and place of birth under section 552.117. However, you have not demonstrated the employee requested confidentiality of his social security number or his family information on his election form; furthermore, an employee’s place of birth is not made confidential by section 552.117. Therefore, the city may not withhold any of the remaining information you have marked under section 552.117.³

You raise section 552.130 of the Government Code for a portion of the remaining information. Section 552.130 provides information relating to a motor vehicle operator’s license or driver’s license issued by a Texas agency is excepted from public release. Gov’t Code § 552.130(a)(1). Therefore, the city must withhold the copy of a Texas driver’s license

³We note section 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 under the Act.

and the additional Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

You argue portions of the remaining information are subject to section 552.136 of the Government Code, which provides:

(a) “[A]ccess 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 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 [the Act], 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(a), (b). Therefore, the city must withhold the bank account number and bank routing number we have marked under section 552.136.⁴ You also seek to withhold the employee identification numbers you have marked in the remaining information. However, you have not provided any arguments explaining how the employee identification numbers, whether used alone or in conjunction with another device, may be used to obtain money, goods, or services, or to initiate a transfer of funds. Thus, we find you have failed to demonstrate how the employee identification numbers constitute an access device for purposes of section 552.136. Therefore, the city may not withhold the employee identification numbers you have marked under section 552.136 of the Government Code.

In summary, the city must withhold the W-4 form we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The city must withhold the information we have marked under sections 552.101 and 552.102 of the Government Code. The city must withhold the name and address of the employee under section 552.117(a)(1) of the Government Code. The city must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The city must withhold the bank account number and bank routing

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information, including W-4 forms under section 552.101 of the Government Code, a copy of a Texas driver’s license under section 552.130 of the Government Code, and a bank account and bank routing number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

number we have marked under section 552.136 of the Government Code. 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/em

Ref: ID# 388414

Enc. Submitted documents

c: Requestor
(w/o enclosures)