



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2010

Ms. Martha T. Williams
Olson & Olson, L.L.P.
For City of Rosenberg
2727 Allen Parkway, Suite 600
Houston, Texas 77019

OR2010-11360

Dear Ms. Williams:

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# 388353.

The Rosenberg Police Department (the "department"), which you represent, received a request for five categories of information pertaining to a named department officer. You state that the department has released most of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the department's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Gov't Code § 552.301. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). The department states, and the submitted documents reflect, that the department received the request for information on May 7, 2010. Accordingly, the tenth business day after the receipt of the request was May 21, 2010. You did not request a decision from this office or state your exceptions to disclosure until May 25, 2010. Therefore, we find the department failed to comply with the procedural requirements mandated by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to

withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). You raise sections 552.101, 552.102, 552.117 and 552.130 of the Government Code as exceptions to disclosure. In addition, we note the submitted information may also be subject to sections 552.136 and 552.137 of the Government Code.¹ Because sections 552.101, 552.102, 552.117, 552.130, 552.136, and 552.137 can provide compelling reasons to withhold information, we will consider the applicability of these exceptions to 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 other statutes make confidential. The submitted documents contain W-4 forms. 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). Therefore, the department must withhold the W-4 forms 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.²

You claim portions of the remaining information are excepted under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.102 of the Government Code. Common-law privacy protects information that (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. *See 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. *See id.* at 681-82. 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

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²As our ruling is dispositive, we do not address your argument against disclosure for portions of this information.

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.

The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. *Indus. Found.* at 683. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses is protected by 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). This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, protected under common-law privacy).

Upon review, we agree that some of the remaining information is personal financial information or medical information that is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold this information, which we have marked, under common-law privacy.³

You claim portions of the remaining information, which you have highlighted, are protected under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure the home addresses, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.⁴ Gov’t Code § 552.117(a)(2). We agree most of the information you marked is subject to section 552.117(a)(2). However, we note that some of the information you have highlighted does not consist of a home address, home telephone

³As our ruling is dispositive, we do not address your remaining argument for portions of this information.

⁴“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

number, social security number, or family member information. Therefore, this information, which we have marked, may not be withheld under section 552.117 of the Government Code. Thus, with the exception of the information we have marked, the department must withhold information you have highlighted, as well as the additional personal information of a peace officer we have marked, under section 552.117(a)(2) of the Government Code.

You assert portions of the remaining information are subject to section 552.130 of the Government Code. Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. *Id.* § 552.130(a)(1), (2). We note section 552.130 does not make information regarding the state of issuance confidential because in order for section 552.130 to be applicable, the motor vehicle information must be issued by an agency of the State of Texas. Accordingly, the department must withhold the Texas motor vehicle information we have marked under section 552.130 of the Government Code.

We further note the remaining information contains bank account numbers and bank routing numbers subject to section 552.136 of the Government Code. Section 552.136 provides that "[n]otwithstanding 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(b); *see id.* § 552.136(a) (defining "access device"). Thus, the department must withhold the information we have marked under section 552.136 of the Government Code.

We note the remaining information contains personal e-mail addresses that are subject to section 552.137 of the Government Code, which 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 id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owner of the e-mail addresses has affirmatively consented to their disclosure.

In summary, the department must withhold the W-4 forms 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. The department must withhold the information we have marked under common-law privacy. With the exception of the information we have marked, the department must withhold the information you have highlighted, as well as the additional information we have marked, under section 552.117(a)(2) of the Government Code. The department must withhold the Texas motor vehicle information we have marked under section 552.130 of the Government Code. The department must withhold the information we have marked under section 552.136 of the Government Code. The department must withhold the e-mail addresses we have marked under 552.137 of the Government Code,

unless the department receives consent for their disclosure.⁵ The remaining information must be released.⁶

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,



James McGuire
Assistant Attorney General
Open Records Division

JM/dls

Ref: ID# 388353

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten specified categories of information without the necessity of requesting an attorney general decision. These categories include: employee direct deposit forms under section 552.101 of the Government Code in conjunction with common-law privacy; W-4 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; Texas driver's license numbers under section 552.130 of the Government Code; bank account and bank routing numbers under section 552.136 of the Government Code; and e-mail addresses of members of the public under section 552.137 of the Government Code.

⁶We note that the information being released contains a social security number, which you have highlighted. 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.