



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2011

Mr. Randolph Kimble Whittington
Attorney at Law
For Hidalgo County Water Improvement District No. 3
2014 East Harrison Avenue
Harlingen, Texas 78550

OR2011-04740

Dear Mr. Whittington:

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# 413944.

The Hidalgo County Water Improvement District No. 3 (the "district"), which you represent, received a request for sixteen categories of information regarding the district's budget, financial statements, raw water schedule, investment and policy reports, depository agreements, W-2 and 1099 Forms, and certain bank statements. You state you are withholding W-2 forms, which you state are the only records responsive to categories 14 and 15 of the request, pursuant to Open Records Decision No. 684 (2009).¹ You also indicate you have released some of the information responsive to category 13 for bank statements to the requestor. You claim that portions of the submitted information are

¹We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including W-2 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code, without the necessity of requesting an attorney general decision.

excepted from disclosure under section 552.101 of the Government Code. You also indicate that release of the submitted information may implicate the privacy interests of certain district employees and members of the district's governing body. Accordingly, you inform us that you notified these individuals of the request and of their right to submit arguments to this office as to why their information should not be released.² See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by a representative of the requestor (the "requestor") and an interested party. *Id.*

Initially, we note that you have only submitted information responsive to category 13 of the request for information. Further, you inform this office that you are withholding information responsive to categories 14 and 15 pursuant to Open Records Decision No. 684. Thus, to the extent any information responsive to the remaining categories of the request existed and was maintained by the district on the date the district received the request, we assume you have released it. If you have not released any such information, you must do so at this time. See *id.* §§ 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).

Next, we address the requestor's assertion that section 6103(a) of title 26 of the United States Code does not make W-2 forms prepared or maintained by the district confidential. The requestor claims that section 6103(a) only makes information in the hands of the Internal Revenue Service ("IRS") or information obtained directly or indirectly from the IRS confidential. The requestor contends that because the W-2 forms at issue in this case were not obtained directly or indirectly from the IRS, the district should not be allowed to rely on Open Records Decision No. 684 to withhold the responsive W-2 forms. In support of his contention, the requestor cites to, among other things, a federal court of appeals case, *Stokwitz v. United States*, 831 F.2d 893 (9th Cir. 1987) and different state attorney general opinions. Upon review, we disagree with the requestor's contention. In Open Records Decision No. 226 (1979), we examined this issue and determined the confidentiality protection of section 6103(a) of title 26 of the United States Code applied to information contained in W-2 forms maintained by a governmental body. Open Records Decision No. 226. See generally Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Further, we find that the cases cited by the requestor are distinguishable from the situation before us. Thus, we conclude the district may continue to rely on Open Records Decision No. 684 to withhold the responsive W-2 forms at issue.

²We note that, to date, we have not received any comments from third parties asserting a privacy interest in any of the submitted information.

We now address your claim that the marked check images are confidential. 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 made confidential by other statutes. As noted above, 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 (tax returns); ORD Nos. 600, 226 (W-2 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 IRS 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). A taxpayer is defined as "any person subject to any internal revenue tax." 26 U.S.C. § 7701(a)(14).

You claim that the check images you marked, to the extent they include the identity and amount of income of the district employees and members of the district's governing board, are "return information" for purposes of section 6103(a). However, we find you have failed to demonstrate how check images contained in the district's bank statements constitute tax return information received by, recorded by, prepared by, furnished to, or collected by the Secretary of the IRS. Accordingly, we find the information you have marked does not constitute tax return information for the purposes of section 6103 of title 26 of the United States Code, and the district may not withhold it under section 552.101 of the Government Code on that basis. Cf. Gov't Code § 552.022(a)(2) (requiring disclosure of "the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body"), (3) (requiring disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body").

We note, however, that portions of the submitted information may be subject to section 552.117(a)(1) of the Government Code.³ Section 552.117(a)(1) of the Government Code exempts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). However, we note that an individual's post office box number is not a "home address" for the purposes of

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.117. *See* 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). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. You do not indicate whether the employees whose information is at issue requested confidentiality pursuant to section 552.024. Accordingly, if the employees timely elected confidentiality, then the district must withhold the information we have marked under section 552.117(a)(1). If any of the employees did not timely elect confidentiality, the district may not withhold their marked information under section 552.117(a)(1).

We also note the submitted bank statements and check images contain information subject to section 552.136(b) of the Government Code, which states 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the district must withhold the bank account numbers, bank routing numbers, and credit card numbers we have marked pursuant to section 552.136.⁴

In summary, if the employees timely elected confidentiality under section 552.024 of the Government Code, then the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must also withhold the information 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

⁴We note that ORD No. 684 also authorizes all governmental bodies to withhold bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/tf

Ref: ID# 413944

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Roman E. Longoria, Jr.
1210 Harvey
McAllen, Texas 78501
(w/o enclosures)