



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 28, 2011

Mr. Nick Turner  
Assistant County Attorney  
Houston County Attorney's Office  
7701 Wilshire Place Drive  
Houston, Texas 77040

OR2011-17398

Dear Mr. Turner:

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# 439934.

The Harris County Toll Road Authority (the "county") received a request for all personnel and payroll records pertaining to two named employees. We understand you to claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the county's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires a governmental body to 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. Gov't Code § 552.301(b). We note the county received the request for information on September 22, 2011. Therefore, the county's ten-business-day deadline to request a ruling was October 6, 2011. The county did not submit its request for a ruling to this office until October 13, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents via first class United States mail, common or contract carrier, or interagency mail). Accordingly, the county did not request a decision from this office within the ten-business-day period prescribed by subsection 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). Because sections 552.101, 552.102, 552.130, 552.136, and 552.137 of the Government Code are compelling reasons, we will consider your arguments under these exceptions.

Next, you state the county will withhold information subject to section 552.117 of the Government Code under section 552.024(c) of the Government Code,<sup>1</sup> certain information pursuant to Open Records Decision No. 684 (2009),<sup>2</sup> and social security numbers under

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<sup>1</sup>Section 552.024(c) of the Government Code authorizes a governmental body to redact under section 552.117(a)(1), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee who properly elected to keep this information confidential. *See* Gov't Code § 552.024(c); Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Because the protection afforded by section 552.117 includes "current or former" officials or employees, we note the protection generally does not lapse at death, as it is also intended to protect the privacy of the employee's family members. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). We note, however, because the protection of social security numbers under section 552.117 is intended solely to protect the privacy of the employee, it lapses at death. *See Moore*, 589 S.W.2d at 491.

<sup>2</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a direct deposit authorization form under section 552.101 of the Government Code in conjunction with common-law privacy, W-2 and W-4 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code, a driver's license number under section 552.130 of the Government Code, a bank account number and bank routing number under section 552.136 of the Government Code, and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.130 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(c)). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(d), (e)). Thus, the statutory amendments to section 552.130 of the Government Code supercede Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) in accordance with section 552.130, not Open Records Decision No. 684. We note the purpose of sections 552.130, 552.136, and 552.137 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, the above types information pertaining to a deceased individual may not be withheld under their respective exceptions. *See Moore*, 589 S.W.2d at 491; *see also* JM-229; H-917; Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death).

section 552.147 of the Government Code.<sup>3</sup> You also state you have redacted personal financial information, dates of birth, health and medical information, and information about on-the-job injuries. However, you do not assert, and our records do not indicate, the county is authorized to withhold these types of information without first seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000) (listing two types of previous determinations which authorize governmental body to withhold requested information without seeking open records ruling from attorney general). Although you have not submitted any such information for our review, we caution the county not to withhold requested information, unless authorized by statute to do so or the information is the subject of a previous determination this office issued under section 552.301 of the Government Code authorizing the county to withhold the information. *See* Gov't Code §§ 552.301(e)(1)(D), .302. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See id.* § 552.302.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”<sup>4</sup> Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, including section 1324a of title 8 of the United States Code, which provides 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). However, after reviewing Exhibit C, we find it does not contain an I-9 form or information appended to such form. Accordingly, we conclude that the county may not withhold any portion of Exhibit C under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 also encompasses section 1304(b) of title 8 of the United States Code, which addresses the confidentiality of records of the registration of aliens under section 1301 of the United States Code. Section 1304(b) provides:

(b) Confidential Nature

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only

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<sup>3</sup>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. Gov't Code § 552.147(b).

<sup>4</sup>Although we understand you to raise section 552.101 in conjunction with section 552.003 of the Government Code, you do not explain how section 552.003 makes any information confidential under the Act. *See* Gov't Code § 552.003 (defining “governmental body” and other terms for purposes of the Act).

(1) pursuant to section 1357(f)(2) of this title, and

(2) to such persons or agencies as may be designated by the Attorney General.

8 U.S.C. § 1304(b). Upon review, we find the alien registration information we have marked in Exhibit C is confidential under section 1304(b) of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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 elements of the test must be established. *Id.* at 681-82. This office has found personal financial information not related to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (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 are protected under common-law privacy), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has found financial information related only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600, 545, 523 (1989), 373 (1983). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the county must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information either is not highly intimate or embarrassing or is a matter of legitimate public interest, and the county may not withhold it on the basis of common-law privacy. *See also* Open Records Decision Nos. 562 at 10 (1990), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 405 at 2 (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (reasons for employee's resignation ordinarily not private).

You seek to withhold the information in Exhibit D under the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, which governs the availability of student records held by educational institutions or agencies receiving federal funds. These provisions apply only to student records in the custody of educational institutions and to records directly transferred from the educational institution to the third party. 34 C.F.R. § 99.33(a)(2). Although the submitted information includes transcripts, the transcripts are maintained by the county, which is not an educational

institution. Further, you state the county received the transcripts from the employees, not from the educational institutions that created them. We therefore find the county may not withhold any portion of Exhibit D on the basis of FERPA.

You claim portions of the submitted information are excepted from disclosure under section 552.102 of the Government Code. 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.” Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code. However, we note section 552.102(a) protects the privacy interests of individuals. The right of privacy lapses at death. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1. Therefore, the date of birth of the deceased individual may not be withheld under section 552.102(a).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license or driver’s license issued by a Texas agency, or another state or country, is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov’t Code § 552.130(a)(1)). However, section 552.130 is designed to protect the privacy of individuals, and the right to privacy expires at death. *See Moore* at 491; ORD 272 at 1. The copy of a driver’s license submitted as Exhibit E belonged to the deceased individual. Accordingly, the county may not withhold this information under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides “[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); *see id.* § 552.136(a) (defining “access device”). Upon review, we find none of the remaining information constitutes an access device number. Therefore, the county may not withhold any of the remaining information under section 552.136 of the Government Code.

Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Upon review, we find the submitted information does not contain any e-mail addresses of a member of the public. Accordingly, none of the submitted information may be withheld under section 552.137 of the Government Code.

In summary, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 1304(b) of title 8 of the United States Code. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The county must withhold the information we have marked under section 552.102(a) of the Government Code. The county must release the remaining information.

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](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# 439934

Enc. Submitted documents

c: Requestor  
(w/o enclosures)