



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 21, 2012

Ms. Susan Fillion
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, Fifteenth Floor
Houston, Texas 77002

OR2012-02621

Dear Ms. Fillion:

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# 446513 (CA File# 11PIA0519).

The Harris County Attorney's Office (the "county attorney's office") received a request for information pertaining to a named individual, personnel files of nine named attorneys, information pertaining to a specified request for information, and documents pertaining to Harris County Case Number 201028404. You indicate the county attorney's office does not maintain information responsive to a portion of the request.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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).

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we note you have not submitted information responsive to the portion of the request for information pertaining to a specified request for information. Although you state the county attorney's office submitted a representative sample of the requested information, we find the submitted information is not representative of this portion of the request. Accordingly, to the extent any information responsive to this portion of the request existed on the date the county attorney's office received the request, we assume the county attorney's office has released it. If the county attorney's office has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The submitted information contains a court-filed document that is subject to subsection 552.022(a)(17). You seek to withhold the information at issue, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.117 of the Government Code. We note common-law privacy is not applicable to information contained in public court records. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992). Therefore, no portion of the submitted court-filed document may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. However, as sections 552.117 and 552.130 of the Government Code make information confidential for purposes of section 552.022(a)(17), we will consider your arguments under those sections for the submitted court-filed document.

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. 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. *See* 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), *aff’d in part*, 993 F.2d1111 (4th Cir. 1993). Thus, the submitted W-4 forms, which you have marked, constitute tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code. Upon review, however, we find no portion of the remaining information is subject to section 6103(a) of title 26 of the United States Code, and the county attorney’s office may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form 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). Upon review, we find no portion of the remaining information consists of an I-9 form. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 of the Government Code also encompasses the Family Medical Leave Act (the “FMLA”), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

Records and documents relating to certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You argue some of the remaining information is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Upon review, we find no portion of the remaining information is subject to section 825.500 of title 29 of the Code of Federal Regulations. Accordingly, the county attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 of the Government Code also encompasses information protected by chapter 411 of the Government Code, which makes confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See id.* § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov't Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. You argue some of the remaining information consists of CHRI that must be withheld under section 552.101 in conjunction with section 411.083 of the Government Code. Upon review, however, we find no portion of the remaining information consists of CHRI that is confidential under section 411.083, and the county attorney's office may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See Occ. Code* §§ 151.001-165.160. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Id. § 159.002(a)-(b). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find you have not demonstrated how any portion of the remaining information consists of medical records for purposes of the MPA, and the county attorney's office may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *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. 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 No. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). This office has also found personal financial information not relating to the 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, 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 relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* ORDs 600 (designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Therefore, financial information relating to retirement benefits must be disclosed if it reflects the employee's mandatory contributions to a retirement program. *See* ORD 600. On the other hand, information is excepted from disclosure if it relates to a voluntary investment the employee made in an optional benefits plan offered by the agency. ORD 600. We note the scope of a public employee's privacy is narrow. *See* Open Records Decision No. 423 at 2 (1984); *see also* Open Records Decision Nos. 562 at 10 (1990), 470 (1987), 444 at 3 (1986). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the county attorney's office must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus,

the remaining information may not be withheld under section 552.101 in conjunction with 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.”³ Gov’t Code § 552.102(a). The Texas Supreme Court 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.*, 354 S.W.3d 336 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked information that must be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers and home facsimile numbers, provided the cellular telephone service and facsimile number is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We further note section 552.117(a)(1) is not applicable to a former spouse and does not protect the fact that a governmental employee has been divorced. 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). You indicate the employees whose information is at issue timely requested confidentiality for their home addresses and telephone numbers, social security numbers, and family member information under section 552.024 of the Government Code. However, we are unable to determine whether the employees at issue timely requested confidentiality for their emergency contact information. Further, we find you have failed to demonstrate some of the information you marked consists of the home address, telephone number, emergency contact information, social security number, or family member information of a current or former employee of the county attorney’s office. This information, which we have marked for release, may not be withheld under section 552.117(a)(1) of the Government Code. Therefore, with the exception of the information we have marked for release, the county attorney’s office must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code; however, the marked emergency contact information may be withheld under

³The 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.

section 552.117(a)(1) only if the employees timely elected confidentiality for that information under section 552.024.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. We note section 552.130 does not protect the state of issuance of a driver's license. Accordingly, the county attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. However, the remaining information you marked does not consist of motor vehicle record information and it may not be withheld under section 552.130.

We note the remaining information contains an e-mail address that is subject to section 552.137 of the Government Code. Section 552.137 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 address at issue is not excluded by subsection (c). Therefore, the county attorney's office must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its public disclosure.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the county attorney's office must withhold (1) the submitted W-4 forms, which you have marked, under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (2) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the information we marked under section 552.102(a) of the Government Code; (4) with the exception of the information we marked for release, the information you marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code, but may withhold the marked emergency contact information only if the employees timely elected confidentiality for such information pursuant to section 552.024 of the Government Code; (5) the motor vehicle record information we have marked under section 552.130 of the Government Code; and (6) the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner has affirmatively

consented to its public disclosure.⁴ The remaining information, including the remaining information subject to section 552.022(a)(17) of the Government Code, must be released; however, any information that is protected by copyright may be released only in accordance with copyright law.⁵

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/eb

Ref: ID# 446513

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note Open Records Decision No. 684 (2009) is 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 26 U.S.C. § 6103(a); direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy; 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.

⁵We note the information being released contains social security numbers. 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. *See* Gov't Code § 552.147(b).