



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2012

Mr. Frank J. Garza
Law Offices of Davidson and Troilo
7550 West IH-10, Suite 800
San Antonio, Texas 78229

OR2012-05773

Dear Mr. Garza:

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# 451382.

The City of Poteet (the "city") received a request for copies of payroll records, leave records, and paychecks pertaining to a named individual for a specified time period, as well as bank statements and copies of deposits for a specified time period. You state the city has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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 section encompasses the doctrine of 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 there is a legitimate public interest

¹We assume the "representative sample" of information 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 those submitted to this office.

in the essential facts about a financial transaction between an individual and a governmental body. *See generally* Open Record Decision No. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 423 at 2 (1984) (scope of public employee privacy is narrow). Although most of the financial information at issue pertains to financial transactions between the city and an employee, this office has determined that a public employee's net pay is protected by common-law privacy. *See* Attorney General Opinion GA-0572 at 3-5 (2007) (stating net salary necessarily involves disclosure of information about personal financial decisions and is background financial information about given individual that is not of legitimate concern to public). Thus, the city must withhold the net pay we marked under section 552.101 of the Government Code in conjunction with common-law privacy. We also note the submitted information lists the employee's payroll deductions. This office has stated there is a legitimate public interest in an employee's participation in an insurance or retirement program funded in whole or in part by a governmental body. *See* Open Records Decision No. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records). Accordingly, information relating to such programs does not constitute confidential personal financial information. On the other hand, a public employee's allocation of part of the employee's salary to a voluntary investment, health or other program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, ORD 600 (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 (deferred compensation information, participation in voluntary investment program, and election of optional insurance coverage). Upon review, we find the financial information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold this 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, none of the remaining information may be withheld under section 552.101 in conjunction with 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." Gov't Code § 552.102(a). We understand you assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which was discussed above. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336, 348 (Tex. 2010). The supreme court then considered the applicability of section 552.102, not *Industrial Foundation*, and 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. *Id.* at 10. Having carefully reviewed the information at issue, we find none of the remaining information is excepted under section 552.102(a), and it may not be withheld on that basis.

We note that portions of the remaining information may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *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 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 information. Thus, if the employee at issue requested confidentiality under section 552.024 prior to the date the city received the request for information, the city must withhold the personal information we have marked under section 552.117(a)(1). However, if the employee at issue did not timely elect to keep her personal information confidential, the city may not withhold the information we have marked under section 552.117(a)(1).³

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license issued by an agency of this state or another state or country is excepted from public release. *Gov't Code* § 552.130(a)(1). Upon review, we find the city must withhold the driver's license number we have marked under section 552.130.

Section 552.136 of the Government Code provides "[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). An access device number is one that 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, and includes an account number. *See id.* § 552.136(a). Upon review, we find the city must withhold the bank account and routing numbers we have marked under section 552.136.

We note that a portion of the submitted information is 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

²The 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)*.

³Regardless of the applicability of section 552.117, section 552.147(b) of the Government Code authorizes a governmental body to redact the social security number of a living person without the necessity of requesting a decision from this office under the Act. *See Gov't Code* § 552.147(b).

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 city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the employee at issue requested confidentiality under section 552.024 of the Government Code prior to the date the city received the request for information, the city must withhold the personal information we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the driver's license number we have marked under section 552.130 of the Government Code. The city must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. The city must release the remaining information at issue; however, any information subject to copyright may only be released in accordance with copyright law.

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/akg

Ref: ID# 451382

Enc. Submitted documents

c: Requestor
(w/o enclosures)