ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 24, 2012

Mr. J. Daren Brown
Counsel for the City of Fritch
Stockard, Johnston & Brown, P.C.
1800 South Washington, Suite 115
Amarillo, Texas 79102

OR2012-11477

Dear Mr. Brown:

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# 459714.

The City of Fritch (the "city"), which you represent, received a request for all correspondence between named individuals concerning the employment and termination of a named former city official, the named former city official's personnel file, and the hire date, starting salary, and ending salary of the individual at issue. We note you have released the hire date, starting salary, and ending salary of the individual at issue. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from a representative of the named former city official. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note you have not submitted any correspondence between the named individuals concerning the employment and termination of the named former city official. To the extent records related to this portion of the request existed on the date the city received the request for information, we assume you have released them. If the city has not released such information, it must do so at this time. *See id.* §§ 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).

You assert the submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides in part as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act, chapter 101 of the Civil Practices and Remedies Code.

You state that on April 26, 2012, the city received a letter from an attorney that complies with the requirements of the Texas Tort Claims Act. Based on this representation, we find the city reasonably anticipated litigation when it received this request. We also agree you have established the submitted information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the city may generally withhold the submitted information under section 552.103.

We note, however, most of the submitted personnel records are forms completed by the former official, who is the opposing party in the anticipated litigation. The purpose of

section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the city may not withhold the personnel forms completed by the former official under section 552.103. The remaining information consists of pay stubs and other documents contained in the former official's personnel file. It is unclear based on our review whether the former official has seen or had access to these documents. Accordingly, to the extent the former official has seen or had access to these documents, such information is not protected by section 552.103 and must be released. To the extent the former official has not seen or had access to these documents, this information may be withheld under section 552.103. We address your remaining arguments for the information the opposing party has seen or had access to.

You raise section 552.101 for the information the anticipated opposing party has seen or had access to. 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 information protected by other statutes, including section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 "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. 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of the submitted I-9 form in response to this request for information would be for purposes other than for enforcement of the referenced federal statutes. Section 1324a, as a federal law, preempts any conflicting state provisions, including section 21.305 of the Labor Code. *See Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Accordingly, the submitted I-9 form and attachments we have marked are excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law and may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 of the Government Code also encompasses 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 Nos. 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[.]

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 (the "IRS") regarding a taxpayer's liability under title 26 of the United States Code. *See Chamberlain v. Kurtz*, 589 F.2d 827, 840-41 (5th Cir. 1979); *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). We have marked a W-4 form in the submitted information. *See* 26 U.S.C. § 6103(b). Thus, the city must withhold the W-4 form we have marked under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code.

Section 552.101 also 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 in the essential facts about a financial transaction between an individual and a governmental body. *See generally* Open Record Decision Nos. 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 (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. We find you have failed to demonstrate that any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5, 478 at 4 (1987), 455 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). Upon review, we find no portion of the remaining information falls within the zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the city may not withhold any of the remaining information under section 552.101 in conjunction with constitutional 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." Gov't Code § 552.102(a). The former city official's representative asserts 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. *See Indus. Found.*, 540 S.W.2d at 685. 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 has 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. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court then considered the applicability of section 552.102, 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 348. Having carefully reviewed the information at issue, we conclude the city must withhold the dates of birth we have marked under section 552.102(a) of the Government Code. However, we find the remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, 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. *See* Gov't Code § 552.117(a)(2). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service 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). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, it is unclear if the individual at issue is currently a licensed peace officer as defined by article 2.12. Accordingly, if the individual at issue is currently a licensed peace officer as defined by article 2.12, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code, except that the marked cellular telephone number may be withheld only if the cellular service is not paid for by a governmental body. If the individual at issue is not a currently licensed peace officer, then his personal information may not be withheld under section 552.117(a)(2) of the Government Code.[1]

If the individual whose information is at issue is no longer a licensed peace officer, then his personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts the same information for 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 id.* § 552.117(a)(1). 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). We again note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. 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 the information. Therefore, if the individual at issue is no longer a licensed peace officer as defined by article 2.12, then to the extent the individual timely elected confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code, except that the marked cellular telephone number may be withheld only if the cellular service is not paid for by the governmental body. If, however, the individual at issue did not timely elect to keep his personal information confidential, his marked personal information may not be withheld under section 552.117(a)(1).[2]

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, and family member

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[1]As our ruling is dispositive, we need not address the argument under section 552.1175 of the Government Code for this information.

[2]Regardless of the applicability of section 552.117 of the Government Code, we note 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).

information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. Section 552.1175 also encompasses a cellular telephone number, if the cellular service is not paid for by a governmental body. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5–7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). We have marked a telephone number that is subject to section 552.1175. Accordingly, if the individual whose telephone number is marked is currently a licensed peace officer and if he elects to restrict access to information pertaining to himself in accordance with section 552.1175(b), the city must withhold the telephone number we have marked under section 552.1175 of the Government Code. However, if the telephone number is a cellular telephone number, the city may only withhold it if the cellular telephone service is not paid for by a governmental body. If the marked telephone number is not a peace officer's home or cellular telephone number, or if it is the officer's cellular telephone number but its service is paid for with governmental funds, then the city may not withhold the marked telephone number under section 552.1175 of the Government Code.

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 information 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 information we have marked under section 552.136.

In summary, to the extent the former official has not seen or had access to the pay stubs and other documents contained in the former official's personnel file, this information may be withheld under section 552.103. The submitted I-9 form and attachments must be withheld under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The submitted W-4 form must be withheld under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the dates of birth we have marked under section 552.102(a) of the Government Code. If the individual at issue is currently a licensed peace officer as defined by article 2.12, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code, except that the cellular telephone number may be withheld only if the

cellular service is not paid for by a governmental body. If the individual at issue is no longer a licensed peace officer as defined by article 2.12, then to the extent the individual timely elected confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code, except that the cellular telephone number may be withheld only if the cellular service is not paid for by a governmental body. The city must withhold the marked telephone number under section 552.1175 of the Government Code to the extent it belongs to a peace officer who has elected to restrict access to his personal information. If the telephone number is a cellular telephone number, the city may only withhold it if the cellular telephone service is not paid for by a governmental body. The city must withhold the driver's license information we have marked under section 552.130. The city must withhold the information we have marked under section 552.136. 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 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,

Jonathan Miles

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/bhf

Ref: ID# 459714

Enc. Submitted documents

c: Requestor
(w/o enclosures)