



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 29, 2007

Ms. Emily D. Newhouse
Schwartz & Eichelbaum, P.C.
4201 West Parmer Lane, Suite A-100
Austin, Texas 78727

OR2007-00988

Dear Ms. Newhouse:

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# 270051.

The Mission Consolidated Independent School District (the "district"), which you represent, received a request for "[t]he total number of school district employees (full and part time) with criminal records [including] a breakdown of positions and crimes committed[.]" You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted 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 information made confidential under section 411.097 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. 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

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083.

A school district may obtain from CHRI from the DPS if authorized by section 411.097 and subchapter C, chapter 22 of the Education Code; however, a school district may not release CHRI except as provided by section 411.097(d). *See* Gov’t Code § 411.097(d); Educ. Code § 22.083(c)(1) (authorizing school district to obtain from any law enforcement or criminal justice agency all CHRI relating to school district employee); *see also* Gov’t Code § 411.087. Section 411.087 authorizes a school district to obtain CHRI from the F.B.I. or any other criminal justice agency in this state. *See* Gov’t Code § 411.097(d). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI the district obtained from the DPS or any other criminal justice agency in this state must be withheld under section 552.101 of the Government Code in conjunction with section 411.097(d) of the Government Code. *See* Educ. Code § 22.083(c)(1). However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See Id.* § 411.082(2)(B).

You explain that the information submitted in Exhibit B consists of CHRI that the district received from the DPS pursuant to Texas Government Code section 411.097 and Texas Education Code Chapter 22, Subchapter C. Upon review, we agree that the information submitted in Exhibit B constitutes CHRI obtained from the DPS or another criminal justice agency and must be withheld under section 552.101 in conjunction with section 411.097.

Section 552.101 of the Government Code also encompasses the doctrine of common law privacy. Section 552.102(a) of the Government Code excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your privacy claims under section 552.101 and section 552.102(a) together.

In order for information to be protected from public disclosure by the doctrine of common law privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. You assert that release of the remaining submitted personnel information is an invasion of personal privacy. However, this information relates solely to the employee's application, qualifications, and conditions for continued employment. Since there is a legitimate public interest in the qualifications of a public employee and how that employee performs job functions and satisfies employment conditions, the district may not withhold any of the remaining submitted information from public disclosure under section 552.101 or section 552.102 based on the common law right to privacy. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently; and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected under constitutional privacy is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). We have considered your arguments and reviewed the remaining information. We conclude, however, that you have not demonstrated that any of the remaining information comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444 (1986), 423 at 2 (1984). Therefore, none of the remaining submitted information may be withheld under section 552.101 on the basis of constitutional privacy.

You next claim that portions of the remaining information may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security numbers, and family member information of current or former officials or employees of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. However, an individual's personal post office box number is not a "home address" for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See* Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public

employees from being harassed at home). 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). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees timely elected to keep their personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1). The district may not withhold this information under section 552.117(a)(1) if the employees did not make a timely election to keep the information confidential.

Even if an employee's social security number is not protected under section 552.117(a)(1), it must be withheld under section 552.147 of the Government Code. Section 552.147 provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the district must withhold social security numbers under section 552.147.²

Finally, we note that the submitted information includes a private e-mail address. Section 552.137 of the Government Code 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).³ *See* Gov't Code § 552.137(a)-(c). We note that section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The e-mail address we have marked is not of a type specifically excluded by section 552.137(c). Therefore, the district must withhold the marked e-mail address in accordance with section 552.137 unless the district receives consent for its release.

In summary, the information in Exhibit B is CHRI that must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Provided that the employees whose information is at issue timely elected to keep their personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Social security numbers must be withheld under section 552.147 of the Government Code. The district must withhold the marked e-mail address in accordance with section 552.137 of the Government

²We note that 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.

³The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Code unless the district receives consent for its release. The remaining information must be released to the requestor.

Finally, you request that this office issue a “previous determination” that would permit “all Texas public schools” in the future to withhold from disclosure employee CHRI without the need of requesting a ruling from us about whether such information can be withheld from disclosure. We decline to issue such a previous determination at this time.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/eb

Ref: ID# 270051

Enc. Submitted documents

c: Mr. James Osborne
The Monitor
P.O. Box 3267
McAllen, Texas 78502
(w/o enclosures)