



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 24, 2007

Mr. Ron G. McFarlane
Attorney at Law
Dealey, Zimmermann, Clark, Malouf & Macfarlane, P.C.
3131 Turtle Creek Boulevard, Suite 1201
Dallas, Texas 75219-5415

OR2007-13916

Dear Mr. McFarlane:

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# 292677.

The City of Cedar Hill (the "city"), which you represent, received a request for the personnel files of two named firefighter/paramedics. You claim that the requested information is exempted from disclosure under sections 552.101, 552.114, 552.117, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We begin with your claim that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ Consequently, education records that are responsive to a request for information under the Act should not be submitted to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. See 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted for our review, among other things, high school and college transcripts. Because our office is prohibited from reviewing education records to determine whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the transcripts. Such determinations under

¹A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

FERPA must be made by the educational authorities from which you obtained the transcripts. Thus, the city should contact the educational authorities from which the transcripts were obtained and the DOE regarding the applicability of FERPA to the transcripts.

We next note that section 552.022 of the Government Code is applicable to some of the remaining information. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). The remaining information contains completed evaluations that are subject to section 552.022(a)(1). This information is expressly public unless excepted from disclosure under section 552.108 or confidential under “other law.” You do not seek to withhold the completed evaluations under any claimed exception. Therefore, the city must release the completed evaluations, which we have marked, to the requestor. We will now consider your claims for exception of the remaining submitted information.

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 exception encompasses information that other statutes make confidential. Section 6103(a) of title 26 of the United States Code makes federal tax return information confidential. The term “return information” includes “the nature, source, or amount of income” of a taxpayer. 26 U.S.C. § 6103(b)(2). Therefore, the city must withhold the submitted W-4 forms under section 552.101 in conjunction with section 6103(a).

You also raise section 552.101 in conjunction with section 1703.306 of the Occupations Code, which provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member’s agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner’s activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. We have marked information acquired from polygraph examinations that the city must withhold under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

You assert that some of the submitted information is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). But 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); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied). In addition, a pager, fax, or cell phone number provided to an employee at public expense may not be withheld under section 552.117. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular mobile phone numbers provided and paid for by governmental body and intended for official use). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You state, and provide supporting documentation showing, that the employees at issue elected to keep these types of information confidential before the city received the request for information; therefore, the city must withhold this information, which we have marked, under section 552.117.²

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state. *See* Gov't Code § 552.130(a)(1). We have marked Texas driver's license information that the city must withhold under section 552.130.

Section 552.137 of the Government Code states in part that "[e]xcept as otherwise provided by this section, 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

²We note that you marked the addresses and telephone numbers of two individuals employed by governmental bodies other than the city. Because these individuals are not employees of the city, section 552.117 does not apply to their addresses and telephone numbers in this instance.

to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that the city must withhold under section 552.137 unless the owner of the e-mail address has affirmatively consented to its disclosure.

In summary: (1) the city should contact the educational authorities from which the transcripts were obtained and the DOE regarding the applicability of FERPA to the transcripts; (2) the city must release the completed evaluations that we have marked pursuant to section 552.022(a)(1) of the Government Code; (3) the city must withhold the submitted W-4 forms under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code; (4) the marked polygraph information must be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code; (5) the city must withhold the information we have marked under section 552.117 of the Government Code;³ (6) the city must withhold the driver’s license information we have marked under section 552.130 of the Government Code; and (7) the city must withhold the marked e-mail addresses under section 552.137 of the Government Code unless the owner of the e-mail address has affirmatively consented to its disclosure. The remaining information must be released.

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).

³We note that the city may only withhold the personal cellular telephone numbers we have marked, provided that the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home phone number in accordance with section 552.024).

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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/mcf

Ref: ID# 292677

Enc: Submitted documents

c: Mr. Damion Wyatt
151 North Waterford Oaks
Cedar Hill, Texas 75104
(w/o enclosures)