



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2008

Ms. Margo M. Kaiser
Staff Attorney
Open Records Unit
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2008-06661

Dear Ms. Kaiser:

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# 310131.

The Texas Workforce Commission (the "commission") received a request for 39 categories of information regarding Esther Medical Tutorial and Nursing Review Center ("Esther Medical"). You claim that a portion of the submitted information is excepted from disclosure under sections 552.101 and 552.136 of the Government Code. The commission takes no position on whether the remaining information is excepted from disclosure, but you state that release of this information may implicate the proprietary interests of Esther Medical. Accordingly, you inform us, and provide documentation showing, that you notified Esther Medical of the request and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). Esther Medical, in correspondence to this office, asserts that the submitted information is excepted from disclosure under sections 552.102, 552.103, 552.110, 552.117, 552.130, and 552.136 of the Government Code.¹ We have considered the submitted arguments and reviewed the submitted information.

¹Although Esther Medical raises section 552.026 of the Government Code as an exception to disclosure of the educational records of its students, section 552.026 is not an exception to disclosure. Rather, section 552.026 provides that the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. Gov't Code § 552.026. We note, however, that the submitted information does not contain any educational records of Esther Medical's students.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has held that personal financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test.

However, we must also determine whether there is a legitimate public interest in the release of the personal financial information marked by the commission. *See* Open Records Decision No. 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). The financial records at issue reflect tuition and fees paid by the students of Esther Medical. These records were provided by the students as part of their request that the commission investigate Esther Medical. In addition, the students specifically requested that the commission assist them in recouping the tuition paid to Esther Medical under the understanding that it was a licensed school. Further, the commission acted on these complaints and ordered Esther Medical to refund the tuition. Accordingly, we find that there is a legitimate public interest in the release of the financial information in this instance. We therefore determine that none of the information you have marked as financial information is confidential for purposes of common-law privacy. Thus, the commission may not withhold the financial information under section 552.101 of the Government Code.

Next, we address the argument raised by the commission and Esther Medical that portions of the submitted information are excepted from disclosure under section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, 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." Gov't Code § 552.136(b). We agree that the bank account numbers and routing numbers on the submitted checks are access device numbers excepted from disclosure under section 552.136. However, we note that the commission has marked additional information on the checks. The commission has not provided any arguments explaining, nor can we discern, how this additional information constitutes access device numbers. Therefore, the commission has failed to demonstrate that the additional information it has marked is excepted from disclosure under section 552.136. Additionally, Esther Medical contends that social security numbers, dates of birth, and other "private personal information" of its directors, employees, and students are excepted under section 552.136. However, Esther Medical does not provide any arguments explaining, nor can we discern, how these items constitute access device numbers for the purposes of section 552.136. Accordingly, the commission must only withhold the bank account numbers and routing numbers we have marked on the submitted checks under section 552.136 of the Government Code.

Esther Medical asserts that all of the categories of information requested are excepted under various provisions of the Act. We note that the submitted information does not contain information responsive to the request for current instructor listings, facility and equipment inspection reports, requests for approval of additional classroom facility, staff rosters, master student registration lists, unearned tuition affidavits, annual enrollment and outcomes reports, student completer surveys, survey checklists, survey worksheets, attendance rolls, or motor vehicle fleet information. Thus, we do not address Esther Medical's arguments for these categories of information.²

Esther Medical raises section 552.102 of the Government Code for information responsive to the requests for "director's statements," "representative registration applications," and "addendums to registration applications," because it contends these items are included in Esther Medical's personnel records. Section 552.102 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). This office has found that section 552.102 only applies to information in a personnel file of an employee of a governmental body. As noted, the information Esther Medical seeks to withhold is not contained in the personnel file of a commission employee. Therefore, we determine that section 552.102 does not apply to any of the submitted information.

Next, Esther Medical asserts that the information responsive to the request for "reviews and investigations of the school" is excepted from disclosure under section 552.103 of the Government Code, which provides in relevant 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 person's office or employment, is or may be a party.

...

(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). Section 552.103 protects a governmental body's position in litigation, not the litigation position of private companies, such as Esther Medical. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, section 552.103 may only be raised by a governmental body. The commission does not assert that the release of the requested

²As Esther Medical only raises section 552.130 of the Government Code for motor vehicle fleet information, this ruling does not address section 552.130.

information would harm its litigation interests. Accordingly, we conclude that none of the submitted information may be withheld under section 552.103.

Next, we understand Esther Medical to assert that several categories of the submitted information are excepted under section 552.110(b) of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; see also *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). In this instance, Esther Medical makes only a generalized allegation that a competitor can use this information to its competitive advantage and thus cause competitive harm to Esther Medical. Esther Medical has not provided any specific arguments explaining how substantial competitive injury would result from the release of any of the submitted information. Accordingly, Esther Medical has failed to demonstrate the applicability of section 552.110(b), and none of the submitted information may be withheld under this exception.

Next, Esther Medical asserts that information responsive to the requests for “applications for certificate of approval,” “representative registration applications,” and “addendums to registration applications,” is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). By its terms, the protection of section 552.117 is applicable only to personal information of an employee of a governmental body. See *id.* § 552.024 (establishing procedure for the election of personal information by employees and officials of a governmental body). In this instance, Esther Medical seeks to withhold the personal information of its employees, not the personal information of employees of the commission. Therefore, we determine section 552.117 is inapplicable to the submitted information.

We note that the printouts of pages from Esther Medical’s website bear notice of copyright protection. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. See Open Records Decision No. 550 (1990). Thus, the printouts of pages from Esther Medical’s website must be

released to the requestor; however, any information protected by copyright must be released in accordance with copyright law.

In summary, the commission must withhold the bank account numbers and routing numbers we have marked on the submitted checks under section 552.136 of the Government Code. The remaining information must be released in accordance with copyright law.³

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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

³We note that the submitted information 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 under the Act.

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,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 310131

Enc. Submitted documents

c: Ms. Julie E. Johnson
Van Wey & Johnson
Attorneys at Law
3100 Monticello Avenue, Suite 500
Dallas, Texas 75205
(w/o enclosures)

Mr. Lawrence Bosompem
Bosompem & Associates, P.C.
8500 North Stemmons Freeway, Suite 3035
Dallas, Texas 75247
(w/o enclosures)