



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2009

Ms. Cara Leahy White
Taylor Olson Adkins Sralla Elam, LLP
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2009-03792

Dear Ms. White:

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# 338391.

The City of Southlake (the "city"), which you represent, received a request for information relating to the hiring of a named city employee. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.114, and 552.130 of the Government Code. We also understand you to raise sections 552.117 and 552.147 of the Government Code. We have considered the exceptions you raise and reviewed the submitted information.

Initially, we note the requestor amended her request for information to exclude "personal information," including "addresses, social security [numbers], family members, financial information, date of birth, . . . health information, phone numbers, [and] personal email addresses." Thus, such information is not responsive to this request, and the city is not required to release it. Accordingly, we do not address the personal information you have marked under sections 552.117 or 552.147 of the Government Code or the personal financial information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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 other statutes make confidential, such as section 611.002(a) of the Health and Safety Code, which reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. Health & Safety Code §§ 611.004, .0045. Thus, the city may only release the mental health record we have marked in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.¹

Section 552.101 also encompasses section 1703.306 of the Occupations Code. Section 1703.306 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.

¹As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

(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. You assert portions of the remaining information, which you have marked, are polygraph examination results subject to section 1703.306. You state that the requestor does not fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, you must withhold the marked polygraph information under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

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[.]" Gov't Code § 552.102(a). 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, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will consider your privacy claims under both sections 552.101 and 552.102 together.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is 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. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We note that this office has found that the public has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern); 423 at 2 (1984) (scope of public employee privacy is narrow). You have marked portions of the

remaining information you contend are subject to common-law privacy. Upon review, we find the information at issue does not contain intimate or embarrassing information, the release of which would be highly objectionable to a reasonable person. Therefore, you may not withhold any of the remaining responsive information on the basis of common-law privacy.

You seek to withhold portions of the remaining information under section 552.114 of the Government Code, which excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), governs the availability of student records held by educational institutions or agencies receiving federal funds. These provisions only apply to student records in the custody of educational institutions and to records directly transferred from the educational institution to the third party. 34 C.F.R. § 99.33(a)(2). The city, which maintains the information at issue, is not an educational institution. *See Open Records Decision No. 309 at 3 (1983) (City of Fort Worth is not an "educational agency" within FERPA)*. You do not assert, nor does it appear from our review, that the city received these documents directly from the educational institutions at issue; therefore, the city has not established that section 552.114 and FERPA are applicable to the information at issue, and the city may not withhold the information on those grounds.

You have marked portions of the remaining information you contend are protected from disclosure under section 552.130 of the Government Code, which 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. Gov't Code § 552.130(a)(1). We agree that most of this information, which we have marked, consists of Texas motor vehicle record information which the city must withhold under section 552.130 of the Government Code. However, you have not demonstrated that the remaining information at issue, which we have marked for release, consists of Texas motor vehicle record information subject to section 552.130, and it may not be withheld pursuant to this exception.

In summary, the city may only release the mental health record we have marked in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The city must withhold the marked polygraph information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The city must also withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. Any remaining responsive 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 at (512) 475-2497.

Sincerely,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/jb

Ref: ID# 338391

Enc. Submitted documents

cc: Requestor
(w/o enclosures)