



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2009

Ms. Helen Valkavich
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2009-10521

Dear Ms. Valkavich:

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# 350379 (COSA File No. 09-0559).

The City of San Antonio (the "city") received a request for thirteen categories of information related to the city's search for an aviation director. You state you will release the majority of the responsive records to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of 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 the doctrine of common-law 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

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.

personal privacy.” 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 v. Texas Industrial Accident Bd.*, 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 address the city’s section 552.102(a) claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

Common-law privacy protects information that (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. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types 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. *Id.* at 683. This office has also found that a compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (when considering prong regarding individual’s privacy interest, the court recognized distinction between public records found in courthouse files and local police station and compiled summary of information and noted that individual has significant privacy interest in compilation of one’s criminal history). Moreover, we find that a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. In addition, this office has also recognized that public employees may have a privacy interest in their drug test results. *See* Open Records Decision Nos. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (*citing Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff’d*, 795 F.2d. 1136 (3rd Cir. 1986)). However, the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision 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), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

You assert the submitted criminal background check results, drug test results, and personality evaluation are confidential under common-law privacy. In this instance, the criminal history information, drug test results, and personality evaluations you seek to withhold pertain to the city’s director of aviation, not a private citizen, and were collected in the course of his pre-employment screening. Accordingly, we find the public has a legitimate interest in this information. Therefore, the doctrine of common-law privacy is not applicable in this

instance, and the criminal history information, drug test results, and personality evaluation may not be withheld on this basis.

You also assert the personality evaluation is excepted from disclosure under constitutional privacy, which is encompassed by section 552.101 of the Government Code. 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. ORD 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 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, Texas*, 765 F.2d 490 (5th Cir. 1985)).

You argue the personality evaluation implicates the city employee's right to constitutional privacy like the Minnesota Multiphasic Personality Inventory ("MMPI"). We note the MMPI assumes certain components of the personality and scores people as to these traits on a numerical scale to enable comparison with established norms; a report of an individual's MMPI scores therefore purports to reveal highly intimate information about the individual, including negative characteristics. *See* Open Records Decision No. 600 at 5 (1992) (MMPI scores may reveal, *inter alia*, the applicant's tendency toward hysteria, hypochondria, or mood swings). We have determined that such information implicates an individual's constitutional right to privacy as distinct from the individual's common-law right to privacy. Open Records Decision No. 600 at 6 (1992) (relying on *Whalen v. Roe*, 429 U.S. 589 (1977), and *McKenna v. Fargo*, 451 F.Supp. 1355 (D.N.J. 1978)). You state the MMPI is a type of personality inventory examination as is the submitted personality evaluation. However, the submitted information does not contain MMPI scores, which implicate an individual's right to constitutional privacy. Furthermore, we find the submitted personality evaluation is dissimilar to the MMPI "score" contemplated in Open Records Decision No. 600. We, therefore, conclude that the submitted personality evaluation does not reveal intimate details of the applicant's personality, and thus is not confidential under the constitutional right to privacy. Accordingly, the city may not withhold the submitted personality evaluation under section 552.101 in conjunction with constitutional privacy.

You next argue that some of the submitted information is subject to section 552.117 of the Government Code. Section 552.117(a)(1) 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. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected under 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 inform us that the employee at issue started his employment with the city on May 18, 2009, which was after the written request for information was made on May 6, 2009. Therefore, section 552.117 does not apply in this instance because he was only an applicant and not an employee who could have elected to withhold his information at the time the request was received. Thus, the city may not withhold any of the submitted information on this basis.

Section 552.137 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). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

You state that some of the remaining information is excepted under section 552.147 of the Government Code, which provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. The city may withhold the social security number in the submitted information under section 552.147.²

Finally, we note that a portion of the remaining documents are protected by copyright. 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 materials that are subject to copyright protection 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).

In summary, the city must withhold the marked e-mail addresses under section 552.137. The city may withhold the social security number marked under section 552.147. The remaining information must be released, but any copyrighted information must be released in accordance with copyright law.

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.

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.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/rl

Ref: ID# 350379

Enc. Submitted documents

c: Requestor
(w/o enclosures)