



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2012

Ms. Julie Y. Fort
For City of Van Alstyne
McKamie Krueger, L.L.P.
2007 North Collins Boulevard, Suite 501
Richardson, Texas 75080

OR2012-03332

Dear Ms. Fort:

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# 446989.

The City of Van Alstyne (the “city”), which you represent, received a request from two requestors for all records held by the city’s police department (the “department”) referencing a named officer. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We also have considered comments submitted by the requestors. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the requestors assert they were not timely notified of the city’s request for a ruling from this office as required by section 552.301(d) of the Government Code. *See id.* § 552.301(d) (governmental body must provide requestor with copy of governmental body’s written communication to attorney general asking for decision). Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to

statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Regardless of whether the city failed to meet its section 552.301(d) burden, sections 552.101, 552.102, and 552.117 of the Government Code are mandatory exceptions that constitute compelling reasons sufficient to overcome the presumption of openness caused by a failure to comply with section 552.301. *See* Gov't Code §§ 552.007, .352. Accordingly, we will consider the city's arguments under sections 552.101, 552.102, and 552.117. We note that portions of the submitted information are subject to sections 552.130 and 552.136 of the Government Code.¹ Because these sections are also mandatory exceptions that constitute compelling reasons sufficient to overcome the presumption of openness caused by a failure to comply with section 552.301, we will also consider the applicability of sections 552.130 and 552.136 to the submitted information.

Initially, you state the city has withheld some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records 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"). FERPA defines "educational agency or institution" as "any public or private agency or institution which is the recipient of [federal funds] under any applicable program." 20 U.S.C. § 1232g(a)(3). We note neither the city nor the department is an educational institution for purposes of FERPA. *See* Open Records Decision No. 390 at 3 (1983) (City of Fort Worth is not "educational agency" within FERPA). FERPA contains provisions governing access to education records transferred by an educational agency or institution to a third party. In this instance, you state the city may have obtained the information at issue from institutions of higher education. Thus, to the extent the information at issue consists of education records that were directly obtained from an educational institution, the city should contact the educational institutions and the DOE regarding the applicability of FERPA to this information. However, to the extent the withheld information is not governed by FERPA, we assume you have released it. If you have not released this information, you must do so at this time. Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²We have posted a copy of the DOE's letter on the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, you inform us that the city has released some of the requested information with redactions made pursuant to Open Records Decision Nos. 684 (2009)³ and 670 (2001).⁴ We also understand that the city has redacted portions of the submitted information under section 552.1175(f) of the Government Code.⁵ In addition, you indicate the city has redacted portions of the submitted information under section 552.102(a) of the Government Code pursuant to the court's ruling in *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). We note, however, pursuant to section 552.301, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov't Code § 552.301(a), (e)(1)(D). The court ruling at issue does not authorize the city or any other governmental body to withhold the information the city has redacted under section 552.102(a) without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). Thus, this information must be submitted in a manner that enables this office to determine whether the information comes

³Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy; W-2 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; Texas driver's license numbers under section 552.130(a)(1) of the Government Code; Texas license plate numbers under section 552.130(a)(2); and insurance policy, bank account, and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended sections 552.130 and 552.136 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) and subsection 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code §§ 552.130(c), .136(c). If a governmental body redacts information described in subsections 552.130(a)(1) and (a)(3), it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). In addition, if a governmental body redacts information described in subsection 552.136(b), it must notify the requestor in accordance with section 552.136(e). *See id.* Thus, the statutory amendments to subsections 552.130(a)(1) and 552.136(b) superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and 552.136(b) in accordance with sections 552.130 and 552.136, not Open Records Decision No. 684.

⁴Open Records Decision No. 670 is a previous determination to all governmental bodies authorizing them to withhold the home addresses and telephone numbers, personal pager and cellular telephone numbers, social security numbers, and family member information of their peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision.

⁵Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure and a criminal investigator of the United States as described by article 2.122(a) who properly elects to keep this information confidential. *See* Gov't Code § 552.1175(b), (f).

within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information at issue; thus, being deprived of that information does not inhibit our ability to make a ruling. However, in the future, failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See* Gov't Code § 552.302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). In this instance, release of the submitted I-9 form would be "for purposes other than enforcement" of the referenced federal statutes. Accordingly, we conclude this information, which we have marked, is confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). You claim that a portion of the remaining information is confidential under section 159.002. This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Upon review, we have marked a medical record that is subject to the MPA. Accordingly, this information may only

be released in accordance with the MPA. We find that you have failed to demonstrate how any of the remaining information constitutes a medical record for purposes of the MPA. Therefore, none of the remaining information is confidential under the MPA, and no portion of this information may be withheld under section 552.101 of Government Code on this basis.

Section 552.101 of the Government Code also encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to the Texas Commission on Law Enforcement Officers Standards and Education (“TCLEOSE”) under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides:

- (a) All information submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under [the Act], unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.
- (b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. The remaining information includes F-5 Separation of Licensee forms submitted to TCLEOSE pursuant to subchapter J of chapter 1701 of the Occupations Code. In this instance, the forms at issue do not reflect the named officer was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the city must withhold the F-5 forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.⁶

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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. *See 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. *See id.* at 681-82. The types of information considered intimate or 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. *See id.* at 683. 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. U. S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court recognized distinction

⁶As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. This office also has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). In addition this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision No. 545 (1990).

In this instance, the remaining information pertains to an officer who is employed by the department. This office has determined in numerous formal decisions that the public has a legitimate interest in the qualifications and performance of public employees. *See e.g.*, 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), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (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). This office also has found that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See generally* ORD 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). However, a public employee's allocation of part of the employee's salary to a voluntary investment, health or other program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See e.g.*, Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (deferred compensation information, participation in voluntary investment program, and election of optional insurance coverage). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Accordingly, this information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.⁷ However, you have failed to demonstrate how any of the remaining information is protected under common-law privacy. Accordingly, none of this information may be withheld under section 552.101 on that basis.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwanted invasion of personal privacy." Gov't Code § 552.102(a). We understand you to assert the privacy

⁷As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. See *Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, *writ ref'd n.r.e.*), the Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. See *Tex. Comptroller of Pub. Accounts*, 354 S.W.3d at 342. The supreme court then considered the applicability of section 552.102, and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. See *id.* at 346. Accordingly, the city must withhold the named officer's birth date, which we have marked, under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information regarding a peace officer regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.⁸ See Gov't Code § 552.117(a)(2). We note 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 6 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at *home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985)). You raise section 552.117(a)(2) for some of the remaining information. Upon review, we find the information we have marked under section 552.117(a)(2) constitutes the personal information of the named officer. Accordingly, the city must withhold this information under section 552.117(a)(2) of the Government Code.

Section 552.130 provides information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state or another state or country is excepted from public release. See Gov't Code § 552.130(a)(1)-(2). The city must withhold the driver's license and motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides 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. See *id.* § 552.136(b), see also *id.* § 552.136(c) (defining "access device"). This office has determined that insurance policy numbers are subject to section 552.136. Accordingly, the city must withhold the insurance group and policy numbers we have marked under section 552.136 of the Government Code.

⁸We note "peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

In summary, the city must withhold the I-9 form we have marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The city may only release the medical record we have marked in accordance with the MPA. The city must withhold the F-5 forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and sections 552.102(a), 552.117(a)(2), 552.130, and 552.136 of the Government Code. The city must release the remaining information.⁹

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, toll free at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/dls

Ref: ID# 446989

Enc. Submitted documents

c: Requestors
(w/o enclosures)

⁹We note the information being released 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. *See Gov't Code* § 552.147(b).