ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2013

Ms. Neera Chatterjee
Office of General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2013-07269

Dear Ms. Chatterjee:

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# 486071 (University OGC# 148761).

The University of Texas at Arlington (the "university") received a request for the complete employment files of two named officers, including evaluations, training records, and "complaints and/or investigations."[1] You indicate the university will withhold some information pursuant to sections 552.024 and 552.147 of the Government Code and Open Records Decision No. 670 (2001).[2] You state the university is handling the release of much of the requested information but claim some of the submitted information is excepted from

[1]The requestor made an initial request for information and then subsequently narrowed it. *See generally* Gov't Code § 552.222.

[2]Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). 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 id.* § 552.147(b). Open Records Decision No. 670 authorizes the withholding of home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family information of peace officers under section 552.117(a)(2) of the Government Code, without the necessity of requesting an attorney general decision.

disclosure under sections 552.101, 552.102, 552.108, and 552.122 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.[3]

Section 552.101 of the Government Code 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 section 51.971 of the Education Code, which provides in relevant part the following:

> (a) In this section:
>
> > (1) "Compliance program" means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:
> >
> > > (A) ethics and standards of conduct;
> > >
> > > (B) financial reporting;
> > >
> > > (C) internal accounting controls; or
> > >
> > > (D) auditing.
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> . . .
>
> (c) The following are confidential:
>
> > (1) information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and
> >
> > (2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher

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[3]We assume 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 those records contain substantially different types of information than that submitted to this office.

> education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.
>
> (d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

Educ. Code § 51.971(a), (c)-(d). The submitted documents contain information related to complaints made against university officers. You state in response to these complaints, the university "initiated its internal process of review to assess and ultimately, ensure that its [police department] employees complied with all applicable laws, rules, regulations and policies." Thus, we agree the information at issue pertains to the university's compliance program for purposes of section 51.971. *See id.* § 51.971(a).

You inform us some of the reports pertain to complaints that were determined to be unsubstantiated or without merit, and the remaining reports pertain to complaints that were determined to be substantiated in part. You state none of the individuals involved has consented to the disclosure of their identifying information. *See id.* § 51.971(d). You assert the reports pertaining to complaints that were determined to be unsubstantiated or without merit are confidential in their entirety because "redacting identifying information of individuals who are alleged to have or may have planned, initiated, or participated in activities that are the subject of a report is not sufficient given the targeted nature of the instant public request." However, upon review, we find you have not demonstrated the reports at issue are confidential in their entirety pursuant to section 51.971. Nevertheless, we agree release of portions of the information at issue would directly or indirectly reveal the identity of the individuals who made the complaints, participated in the compliance program investigations, or were alleged to have participated in the activities subject to complaints that were determined to be unsubstantiated or without merit. *See id.* § 51.971(c)(1)-(2). Accordingly, the university must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Government Code. However, the remaining information at issue is either not information that would directly or indirectly reveal the identities of the individuals at issue or it does not pertain to individuals who made the complaint, sought guidance from the compliance program office, or participated in the investigation, or individuals who were alleged to have or may have planned, initiated, or participated in activities that are the subject of a complaint that was determined to be unsubstantiated or without merit. Consequently, you have failed to show how any of the remaining information is confidential under section 51.971 of the Education Code, and the university may not withhold it under section 552.101 of the Government Code on that basis.

We note a portion of the submitted information is subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-168.202. Section 552.101 also encompasses information protected by the MPA. Section 159.002 of the MPA provides in relevant part the following:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (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.

Id. § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. Upon review, we find a portion of the submitted information constitutes information obtained from medical records. Accordingly, the university must withhold this information, which we have marked, under section 552.101 in conjunction with the MPA.[4]

Section 552.101 also encompasses the doctrine of constitutional privacy. 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. Open Records Decision No. 455 at 4 (1987). 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 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d 490 at 492 (5th Cir. 1985)). Upon review, we find you have failed to establish any of the remaining is confidential under constitutional privacy. Therefore, the university may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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

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[4]As our ruling is dispositive, we do not address your other arguments to withhold this information.

the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455(prescription drugs, illnesses, operations, and physical handicaps). However, this office has also found 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. 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job). Upon review, we find you have not established any of the remaining information is highly intimate or embarrassing. Therefore, the remaining information is not confidential under common-law privacy, and the university may not withhold it under section 552.101 on that ground.

You also claim some of the submitted information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) 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). The Texas Supreme Court 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. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we agree the university must withhold the information you have marked under section 552.102(a) of the Government Code.

You seek to withhold questions and answers from quizzes and tests administered by the university's police department to officers in training under sections 552.108(b)(1) and 552.122 of the Government Code. Section 552.122(b) of the Government Code excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. ORD 626 at 6. Upon review, some of the submitted information consists of "test items" for purposes of section 552.122(b). Therefore, you may withhold this information, which we have marked, under section 552.122(b).[5] However, we conclude you have failed to establish any of the

[5]As our ruling is dispositive, we do not address your other argument to withhold this information.

remaining information at issue is a test item for purposes of section 552.122(b). Therefore, the university may not withhold any of the remaining information on that ground.

Section 552.108(b) of the Government Code excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). This section is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To claim this aspect of section 552.108 protection, however, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding police department's use of force policy), 508 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common-law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You assert release of the remaining quiz- and test-related information is excepted from release under section 552.108(b)(1) because "[k]nowledge of what officer trainees focus on during their training (or do not focus on) could make the [u]niversity vulnerable and hinder its ability to effectively secure the campus." However, we find the university has not established the release of the remaining information at issue would interfere with law enforcement. Therefore, the university may not withhold this information under section 552.108(b)(1).

To conclude, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Government Code and the MPA. The university must also withhold the information you have marked under section 552.102(a) of the Government Code. The university may

withhold the information we have marked under section 552.122 of the Government Code. The university must release the remaining information.

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,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 486071

Enc. Submitted documents

c: Requestor
(w/o enclosures)