



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 18, 2013

Ms. Jennifer DeCurtis
Counsel for the City of Murphy
Messer, Rockefeller & Fort, P.L.L.C.
6351 Preston Road, Suite 350
Frisco, Texas 75034

OR2013-12379

Dear Ms. DeCurtis:

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# 493646 (City ID# M2013-392).

The City of Murphy (the "city"), which you represent, received a request for a named former city employee's personnel file and copies of any complaints made by the named former employee against a police officer, field training officer, or any other city employee. You state the city is releasing some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.115, 552.117, 552.126, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You seek to withhold Exhibit 4 as an education record under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit a state educational agency or institution to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ *See id.* § 99.3 (defining "personally identifiable information").

¹A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

FERPA governs the availability of student records held by educational institutions or agencies receiving federal funds, and applies only to student records in the custody of educational institutions and to records directly transferred from an educational institution to a third party. 34 C.F.R. § 99.33(a)(2). We note 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 “educational agency” within FERPA). Thus, documents in the possession of the city are not education records unless they were directly transferred from an educational institution to the city. The information at issue reflects the record was issued to the student. Thus, because Exhibit 4 was not obtained by the city directly from an educational institution, it is not an education record and may not be withheld under FERPA. Accordingly, we also do not address your argument under section 552.114 of the Government Code. *See* Open Records Decision No. 539 (1990) (determining same analysis applies under section 552.114 and FERPA).

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 information protected by other statutes such as section 143.089 of the Local Government Code. You do not inform us whether the city is a civil service city as defined under chapter 143 of the Local Government Code. We note the provisions of chapter 143 apply to only civil service cities. Furthermore, subsection 143.089(a) requires the civil service director to maintain a personnel file on each “police officer.” Local Gov’t Code § 143.089(a). Likewise, subsection 143.089(g) states a police department may maintain its own personnel file on each “police officer.” *Id.* § 143.089(g). We note both subsections refer to “police officer.” *See id.* § 143.089(a), (g). Section 143.003 defines a police officer as a member of a police department or other peace officer who was appointed in substantial compliance with chapter 143 or who is entitled to civil service status under section 143.005, section 143.084, or section 143.103. *See id.* § 143.003(5) (defining “police officer” for purposes of section 143.089). You state, in this instance, the individual whose information is at issue was not hired by the city as a police officer. Thus, the individual at issue was not appointed in substantial compliance with chapter 143, and therefore, is not entitled to the rights and privileges of chapter 143 of the Local Government Code. Accordingly, the city may not withhold Exhibit 2 under section 552.101 on this basis.

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code. Section 611.002 provides “[c]ommunications 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(a). 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). Upon review, we find the

information we have marked constitutes confidential mental health records the city must withhold under section 552.101 in conjunction with section 611.002.²

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code. This section makes confidential L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). Section 1701.306 provides, in part:

(a) [TCLEOSE] may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to [TCLEOSE]. A declaration is not public information.

Occ. Code § 1701.306(a), (b). The city must withhold the L-3 Declaration of Psychological and Emotional Health form we have marked under section 552.101 in conjunction with section 1701.306.³

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

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information. We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

S.W.2d 668, 685 (Tex. 1976). 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 to be intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (information pertaining to prescription drugs, illnesses, operations, and physical disabilities protected from disclosure). However, this office has found the public has a legitimate interest in information relating to applicants and employees of governmental bodies and their employment qualifications and job performance, especially where the applicant was seeking a position in law enforcement. *See* Open Records Decision Nos. 562 at 10 (1990), 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 444 (1986), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find you have failed to demonstrate the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold the remaining information under section 552.101 on this basis.

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 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). Upon review, we have marked the information that must be withheld under section 552.102(a). The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

You raise section 552.115 of the Government Code for Exhibit 5, which contains a certificate of birth. Section 552.115(a) provides that “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]” Section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official. The city is not the Bureau of Vital Statistics or a local registration official; therefore, the city may not withhold the submitted certificate of birth under section 552.115. *See* Open Records Decision No. 338 (1982).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note section 552.117(a)(1) is not applicable to a former spouse or the fact that a governmental employee has been divorced. Whether a particular piece of information is protected by 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). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the information we have marked must be withheld under section 552.117(a)(1). The city may not withhold this information under section 552.117 if the former city employee did not make a timely election to keep the information confidential. No portion of the remaining information you seek to withhold constitutes the home address, home telephone number, emergency contact information, social security number, or family member information of current or former city officials or employees. Accordingly, the city may not withhold the remaining information under section 552.117(a)(1).

Section 552.126 of the Government Code excepts from disclosure the “name of an applicant for the position of superintendent of a public school district . . . except that the board of trustees must give public notice of the name or names of the finalists being considered for the position at least 21 days” before a vote or final action is taken. Gov't Code § 552.126. Upon review, we find you have failed to demonstrate how the remaining information in Exhibit 4, which consists of a college transcript for the named former city employee, identifies or tends to identify any particular candidate for the position of superintendent. Accordingly, the city may not withhold the remaining information under section 552.126.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. *Id.* § 552.130(a). We conclude the city must withhold the information we have marked under section 552.130.⁴ However, we find none of the remaining information is subject to section 552.130; thus, it may not be withheld on this basis.

⁴We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Act of May 6, 2013, 83rd Leg., R.S., S.B. 458, § 1 (to be codified as an amendment to Gov't Code § 552.130(c)). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See* Gov't Code § 552.130(d), (e).

Section 552.147 of the Government Code excepts from disclosure the social security number of a living person. *Id.* § 552.147. Upon review, we find, in the event the individual's social security number is not excepted from disclosure under section 552.117(a)(1) of the Government Code, the city may withhold the social security number we have marked under section 552.147.

In summary, the city must withhold the following information: (1) the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code; (2) the L-3 Declaration of Psychological and Emotional Health form we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; (3) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (4) the information we have marked under section 552.102(a) of the Government Code; (5) the information we have marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code; and (6) the information we have marked under section 552.130 of the Government Code. In the event the individual's social security number is not excepted from disclosure under section 552.117(a)(1) of the Government Code, the city may withhold the social security number we have marked under section 552.147 of the Government Code. The city 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 493646

Enc. Submitted documents

c: Requestor
(w/o enclosures)