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ATTORNEY GENERAL OF TEXAS

October 19, 2015

Ms. Lisa D. Mares
Counsel for the City of McKinney
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2015-21823

Dear Ms. Mares:

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# 583566.

The McKinney Police Department (the "department"), which you represent, received a request for four specified reports. The department states it will redact information pursuant to section 552.130(c) of the Government Code.¹ The department claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception the department claims and reviewed the submitted information.

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. Section 552.101 encompasses information protected by section 48.101 of the Human Resources Code, which pertains to the disclosure of reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 provides, in pertinent part, as follows:

¹We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* 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 id.* § 552.130(d), (e).

(a) The following information is confidential and not subject to disclosure under [the Act]:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and
- (3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by [the Texas Department of Family and Protective Services (the "DFPS")] or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(a), (b). Section 48.051 of the Human Resources Code provides "a person having cause to believe that an elderly person, a person with a disability, or an individual receiving services from a provider as described by Subsection F [of chapter 48 of the Human Resources Code] is in the state of abuse, neglect, or exploitation" shall report certain prescribed information to the DFPS or another appropriate state agency. *See* Act of March 30, 2015, 84th Leg., R.S., ch. 1, § 4.259, 2015 Tex. Sess. Law Serv. 1, 792 (Vernon) (to be codified as an amendment to Hum. Res. Code § 48.051(a)); Act of May 29, 2015, 84th Leg., R.S., ch. 860, § 4, 2015 Tex. Sess. Law Serv. 2925, 2926 (Vernon) (to be codified as an amendment to Hum. Res. Code § 48.051(a)); Act of May 30, 2015, 84th Leg., R.S., ch. 1272, § 12, 2015 Tex. Sess. Law Serv. 4294, 4304 (Vernon) (to be codified as an amendment to Hum. Res. Code § 48.051(a)). The only entities authorized to conduct an investigation under chapter 48 of the Human Resources Code are DFPS and certain other state agencies, depending on the circumstances surrounding the incident. *See* Human Res. Code §§ 48.151(a), (d), .152(b), (c); *see also* Act of March 30, 2015, 84th Leg., R.S., ch. 1, §§ 4.264-4.265, 4.281, 4.285, 2015 Tex. Sess. Law Serv. 1, 794, 799, 801 (Vernon) (to be codified as an amendment to Hum. Res. Code §§ 48.151(b), (c), 48.152(a), 48.252, 48.301); Act of May 29, 2015, 84th Leg., R.S., ch. 860, §§ 6, 8-9, 2015 Tex. Sess. Law Serv. 2925, 2926, 2928, 2930 (Vernon) (to be codified as amendments to Hum. Res. Code §§ 48.151(e), 48.252, 48.301); Act of May 30, 2015, 84th Leg., R.S., ch. 1272, §§ 15-17, 2015 Tex. Sess. Law Serv. 4294, 4305-4305, 4309 (Vernon) (to be codified as amendments to Hum. Res. Code §§ 48.151(e), 48.252, 48.301). Thus, reports made by the department generally are not subject to section 48.101. The information in Exhibit B-2 was created by the department in connection with a criminal investigation conducted by the department. Upon review, we find the department has not demonstrated the information at issue was used or developed in an investigation by DFPS under chapter 48 of the Human Resources Code. *See id.* § 48.101(a)(3). Thus, the department has failed to demonstrate the information in Exhibit B-2 pertains to an investigation conducted by an entity authorized to conduct such an investigation under chapter 48. Accordingly, the

department may not withhold the information in Exhibit B-2 under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (personal financial information includes choice of particular insurance carrier), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We note the remaining information contains dates of birth. Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Indus. Found.*, 540 S.W.2d at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.² *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Thus, the department must also withhold the date of birth we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the department has failed to demonstrate the remaining information it has marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the

²Section 552.102(a) exempts 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).

department may not withhold the remaining information it has marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department 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,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 583566

Enc. Submitted documents

c: Requestor
(w/o enclosures)