



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 31, 2016

Ms. Sandra D. Garcia
Assistant General Counsel
Houston Community College
P.O. Box 667517
Houston, Texas 77266-7517

OR2016-07177

Dear Ms. Garcia:

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# 604093.

Houston Community College (the "college") received a request for all employment records pertaining to a named former officer of the college's police department (the "department").¹ You state the college will redact certain information pursuant to sections 552.024(c)(2), 552.130(c), and 552.147(b) of the Government Code, Open Records

¹We note the college sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

Decision No. 670 (2001) and Open Records Decision No. 684 (2009).² You claim the submitted information is excepted under sections 552.101, 552.102, 552.108, 552.1175, 552.119, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the present request because it does not pertain to the named officer. This ruling does not address the public availability of the non-responsive information, which we have marked, and the college need not release it in response to this request.

Next, we note the responsive information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number. Section 552.002(a) of the Government Code defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

²Section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former employee's home address and telephone number, emergency contact information, social security number, and family member information excepted from disclosure under section 552.117(a)(1) without the necessity of requesting a decision from this office under the Act, if the employee timely elected to withhold such information. *See* Gov't Code §§ 552.024(a)-(c), .117(a)(1). 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. *Id.* § 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). 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. *Id.* § 552.147(b). Open Records Decision No. 670 is a previous determination authorizing all governmental bodies to withhold the current and former home addresses and telephone numbers, personal cellular telephone numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision. Open Records Decision No. 684 is 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 a fingerprint under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code and L-2 and L-3 declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand an officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in the commissioner's electronic database and may be used as an access device number on the TCOLE website. Accordingly, we find the officer's TCOLE identification number in the submitted information does not constitute public information under section 552.002 of the Government Code. Therefore, the TCOLE identification number is not subject to the Act and need not be released to the requestor.³

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 of the Government Code encompasses section 1701.454 of the Occupations Code, which governs the public availability of information submitted to TCOLE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides as follows:

(a) All information submitted to [TCOLE] 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 [TCOLE] member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. Exhibit C includes a F-5 Separation of Licensee forms and information that was submitted to TCOLE pursuant to subchapter J of chapter 1701 of the Occupations Code. Furthermore, you state, and the submitted information reflects, the named officer did not resign and was not terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the college must withhold the information we have marked under section 552.101 in conjunction with section 1701.454 of the Occupations Code. You also seek to withhold an L-1 Report of Appointment/License Application and any references to an F-5 or L-1 form in the remaining information under section 1701.454. We note section 1701.454 is applicable only to information submitted to TCOLE under subchapter J of chapter 1701 of the Occupations

³As we are able to make this determination, we need not address your argument against the disclosure of this information.

Code. *See id.* § 1701.454(a). The only report or statement found in subchapter J is form F-5. *See id.* § 1701.452. Therefore, we conclude the college may not withhold the submitted L-1 form or the remaining information under section 552.101 in conjunction with section 1701.454. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov’t Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter E-1 or F of the Government Code. *See* Gov’t Code § 411.083. We note section 411.083 does not apply to active warrant information or other information relating to one’s current involvement in the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). Section 411.094 of the Government Code provides in part:

(b) The Texas Higher Education Coordinating Board and each institution of higher education are entitled to obtain from the [DPS CHRI] maintained by the [DPS] that relates to a person who is an applicant for a security-sensitive position at the coordinating board or institution, as applicable.

(c) [CHRI] obtained under Subsection (b) may be used only for the purpose of evaluating applicants for employment in security-sensitive positions.

(d) [CHRI] received under Subsection (b) may not be released or disclosed to any person except on court order or with the consent of the person who is the subject of the [CHRI].

Id. § 411.094(b)-(d). You state the college is an institution of higher education. *Id.* § 411.094(a)(1) (defining “institution of higher education”); Educ. Code § 61.003(8) (defining “institution of higher education”). You state the college obtained the CHRI for the purpose of evaluating the employee’s application for a security-sensitive position at the college. *See* Gov’t Code § 411.094(a)(2) (defining “security-sensitive position”). Thus, the college must withhold the CHRI we have marked under section 552.101 in conjunction with chapter 411 of the Government Code. However, we find you have failed to demonstrate the remaining information at issue consists of confidential CHRI. Therefore, the college may not withhold the remaining information at issue under section 552.101 on this basis.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. *Id.* § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information in Exhibit D consists of an investigation that did not result in a conviction or deferred adjudication. We note section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). Although you claim Exhibit D is subject to section 552.108(a)(2), we note the information at issue consists of an internal affairs investigation conducted by the college, and is not information that deals with the detection, investigation, or prosecution of crime. Therefore, the college has failed to demonstrate the applicability of section 552.108(a)(2) to Exhibit D and may not withhold it on that basis.

You also claim 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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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 court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has 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. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court considered the applicability of section 552.102, and has 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. *Id.* at 347. Upon review, we find the college must withhold the dates of birth we have marked under section 552.102(a).⁴ The college may not withhold any of the remaining information under section 552.102.

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

As noted above, section 552.101 of the Government Code 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.*, 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. 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. *Id.* 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.⁵ *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. 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), 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). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs 600 at 9 (information revealing employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Whether the public's interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* ORD 373. Furthermore, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, 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), 470 at 4 (1987) (job performance does not generally

⁵As discussed above, 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).

constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private).

Upon review, we find portions of the remaining information satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the college must withhold the information we have marked, including the public citizens' dates of birth, under section 552.101 in conjunction with common-law privacy. However, we find you have failed to demonstrate the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, the college may not withhold the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990). However, individuals who provide information in the course of an investigation are not informants for the purposes of claiming the informer's privilege.

You assert some of the remaining information at issue should be withheld under section 552.101 in conjunction with the common-law informer's privilege because it identifies an informer or witness who provided statements to department investigators in connection with the internal affairs investigation regarding violations of department orders, policies, and procedures. Upon review, however, we find you have failed to demonstrate the applicability of the informer's privilege to the information at issue, and the college may not withhold it under section 552.101 on that basis.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family

member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. Gov't Code § 552.1175. Upon review, we find none of the remaining responsive information is subject to section 552.1175; thus, the college may not withhold any of the remaining responsive on that basis.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], 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.”⁶ *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the college must withhold the information we have marked under section 552.136.

Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the college must withhold the e-mail addresses we have marked under section 552.137 unless the owner of the addresses affirmatively consents to their release.

Section 552.139 of the Government Code provides, in part, “a photocopy or other copy of an identification badge issued to an official or employee of a governmental body” is confidential. *Id.* § 552.139(b)(3). Therefore, the college must withhold the copies of the identification badges issued to an employee of a governmental body, which we have marked, under section 552.139.

The college raises section 552.119 of the Government Code for some of the remaining information. Section 552.119 provides the following:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

(1) the officer is under indictment or charged with an offense by information;

⁶The 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).

(2) the officer is a party in a civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. Upon review, we find the college has not demonstrated, and it is not apparent from our review of the submitted information, the release of the remaining information at issue would endanger the life or physical safety of the peace officer depicted. Therefore the college may not withhold the remaining information at issue pursuant to section 552.119.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Id. § 552.152. Upon review, we find you have failed to demonstrate the release of the remaining information you seek to withhold would subject an employee or officer to a substantial risk of physical harm. Accordingly, the college may not withhold the remaining information at issue under section 552.152.

In summary, the TCOLE identification number is not subject to the Act and need not be released to the requestor. The college must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code, (2) the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code, (3) the dates of birth we marked under section 552.102(a) of the Government Code, (4) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, (5) the information we have marked under section 552.136 of the Government Code, (6) the e-mail addresses we have marked under section 552.137 of the Government Code unless owner of the addresses affirmatively consents to their release, and (7) the information we have marked under section 552.139 of the Government Code. The remaining responsive information must be released.

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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MT/dls

Ref: ID# 604093

Enc. Submitted documents

c: Requestor
(w/o enclosures)