



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 9, 2016

Ms. Susan Camp-Lee
Counsel for City of Round Rock
Sheets & Crossfield, P. C.
309 East Main Street
Round Rock, Texas 78664-5246

OR2016-10464

Dear Ms. Camp-Lee:

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# 609156.

The Round Rock Police Department (the "department"), which you represent, received a request for information pertaining to a named officer. The department states it has released some of the requested information, but claims the submitted information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note the department states it is withholding some of the information in Exhibit C pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office has informed this office 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.¹ See 34 C.F.R. § 99.3 (defining "personally identifiable information"). 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 the educational institution to the third party. *Id.* § 99.33(a)(2). The department is not an educational institution. See Open Records Decision No. 309 at 3 (1983)

¹A copy of this letter may be found on the Office of the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>

(City of Fort Worth not an “educational agency” within FERPA). Further, the submitted information indicates the department received Exhibit C from the named officer in his employment application, and not from an educational institution. Therefore, FERPA is not applicable to Exhibit C, and the department may not withhold it on that basis. The department does not assert, nor does our review of our records indicate, it has been other authorized to withhold the information it redacted in Exhibit C without seeking a ruling from this office. *See* Gov’t Code § 552.301(a); Open Records Decision No. 673 (2000). Nevertheless, because we can discern the nature of the information that has been redacted, being deprived of it does not inhibit our ability to make a ruling in this instance. However, be advised a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov’t Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of “specific information requested”), .302.

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. This section encompasses the doctrine of constitutional privacy, which 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 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). This office has previously determined the release of the score report of the Minnesota Multiphasic Personality Inventory (the “MMPI”) implicates an individual’s constitutional right to privacy. Open Records Decision No. 600 at 6 (1992) (relying on *Whalen v. Roe*, 429 U.S. 589 (1977), and *McKenna v. Fargo*, 451 F.Supp. 1355 (D.N.J. 1978)). We note the MMPI assumes certain components of the personality and scores people as to these traits on a numerical scale to enable comparison with established norms; a report of an individual’s MMPI scores therefore purports to reveal highly intimate information about the individual, including negative characteristics. *See* ORD 600 at 5 (MMPI scores may reveal, *inter alia*, the applicant’s tendency toward hysteria, hypochondria, or mood swings). The responsive information submitted as Exhibit D contains scores from a personality test that reveals highly intimate details of the individual’s personality, including negative characteristics. Upon review, we find the department must withhold Exhibit D under section 552.101 of the Government Code in conjunction with constitutional privacy.²

²As our ruling is dispositive, we do not address the argument of the department to withhold this information.

Section 552.101 also encompasses section 39.030(b) of the Education Code, which provides as follows:

The results of individual student performance on academic skills assessment instruments administered under this subchapter are confidential and may be released only in accordance with the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g). However, overall student performance data shall be aggregated by ethnicity, sex, grade level, subject area, campus, and district and made available to the public, with appropriate interpretations, at regularly scheduled meetings of the board of trustees of each school district. The information may not contain the names of individual students or teachers.

Educ. Code § 39.030(b). The department asserts Exhibit C is confidential under section 39.030(b). However, we note the Education Code “applies to all educational institutions supported in whole or in part by state tax funds unless specifically excluded by this code.” *Id.* § 1.001. As noted above, the department is not an educational institution and, thus, the Education Code does not apply to it. Accordingly, the department may not withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 39.030 of the Education Code.

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[.]”³ Gov’t Code § 552.102(a). The Texas Supreme Court 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. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The department must withhold the information we have marked under section 552.102(a) of the Government Code.

Section 552.122(b) of the Government Code excepts from disclosure a test item developed by a licensing agency or governmental body. Gov’t Code § 552.122(b). 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. Open Records Decision No. 626 at 9 (1994). Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. *See id.* at 6. Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

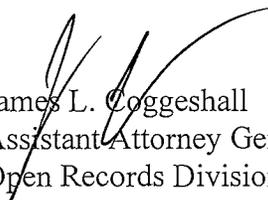
The department seeks to withhold Exhibit B, which consists of a National Police Officer Selection Test, under section 552.122 because it is used by the City of Round Rock in selecting employees for the department. Upon review, we conclude the questions at issue consist of test items under section 552.122(b). We also find release of the answers and responses to these questions would tend to reveal the questions themselves. Therefore, the department may withhold Exhibit B under section 552.122(b).

To conclude, the department must withhold Exhibit D under section 552.101 of the Government Code in conjunction with constitutional privacy and the information we have marked under section 552.102(a) of the Government Code. The department may withhold Exhibit B under section 552.122(b) of the Government Code. 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 609156

Enc. Submitted documents

c: Requestor
(w/o enclosures)