



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 21, 2007

Ms. Patricia Fleming
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P. O. Box 4004
Huntsville, Texas 77342-4004

OR2007-02088

Dear Ms. Fleming:

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# 272373.

The Texas Department of Criminal Justice (the "department") received a request for information relating to the job interview for Administrative Assistant II for Pack I, including the certification of compliance, interview documentation, and whether or not the requestor's personal file contains derogatory information. You claim that the requested information is excepted from disclosure under sections 552.101, 552.122, 552.134, 552.137, and 552.140 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially we note that the department has not submitted the requested certification of compliance. To the extent this information existed on the date the department received this request, we assume you have released it. If you have not released any such information, you must do so at this time.² See Gov't Code § 552.301(a), .302; see also Open Records

¹In your brief dated January 3, 2007 you withdrew your assertions under sections 552.107, 552.108, and 552.111 of the Government Code. Although you raise section 552.103, you have not submitted any arguments explaining how this exception applies to the submitted information. Thus, the department has waived its claim under section 552.103. See Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); see also Open Records Decision No. 665 (2000) (discretionary exceptions in general).

²We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

The requestor has asked the department to answer a question relating to the contents of her personal file. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990).

We note that the department has failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). Within fifteen business days of receiving the request, the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D).

You state in your letter dated December 19, 2006, and in your brief dated January 3, 2007, that the department received this request for information on December 12, 2006. However, upon review of the request, we note that it is stamped by the department as having been received on December 4, 2006. Accordingly, you were required to submit your request to this office no later than December 18, 2006. Further, you were required to submit the items enumerated under section 552.301(e) to us no later than December 27, 2006. However, you did not request a ruling from this office until December 19, 2006, or submit the required documents to this office until January 4, 2007.

A governmental body's failure to comply with the procedural requirements of section 552.301 of the Government Code results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Section 552.122 is a discretionary exception that does not overcome the presumption of openness. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the department has waived its claim under section 552.122. However, sections 552.101, 552.134, 552.137, and 552.140 can provide compelling reasons that overcome the presumption of openness caused by a failure to comply with section 552.301. *See* Gov't Code §§ 552.007, .352; Open Records

Decision No. 674 at 3 n.4 (2001) (mandatory exceptions). Therefore, we will address your arguments under these sections.

Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and 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. 540 S.W.2d at 683.

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 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Upon review of your arguments and the submitted information, we find that no part of the submitted information is subject to common law or constitutional privacy. Accordingly, no part of the submitted information may be withheld on that basis.

You claim that some of the submitted information is excepted from disclosure under section 552.134 of the Government Code. This section relates to inmates of the department and provides in relevant part as follows:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). You state, and the submitted information reflects, that some of the documents at issue contain information about inmates confined in a department facility. Thus, we agree that section 552.134 is applicable to this information. We also find that section 552.029 is not applicable. Therefore, you must withhold the information that we have marked pursuant to section 552.134.

Section 552.137 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). *See id.* § 552.137(a)-(c). The e-mail addresses contained in the submitted information, which we have marked, are not the type specifically excluded by section 552.137(c). Therefore, unless the individuals whose e-mail addresses are at issue consented to release of their e-mail addresses, the department must withhold them in accordance with section 552.137 of the Government Code.

Section 552.140 of the Government Code provides in relevant part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov't Code § 552.140(a). Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a), (b). Upon review, we find that the department first came into possession of the submitted DD-214 form on or after September 1, 2003. Thus, we conclude that the department must withhold this information, which you have marked, under section 552.140.

We note that some of the submitted documents contain information that is excepted from disclosure under sections 552.117, 552.130, and 552.147 of the Government Code.³ Section 552.117(a)(3) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current

³The Office of the Attorney General will raise mandatory exceptions like sections 552.117, 552.130, and 552.147 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

or former employees of the department, regardless of whether the current or former employee complies with section 552.1175.⁴ Thus, you must withhold the information we have marked under section 552.117(a)(3).

Section 552.130 of the Government Code excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” *Id.* § 552.130. In accordance with section 552.130 of the Government Code, the department must withhold the Texas driver’s license information we have marked.

Section 552.147 provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. Pursuant to section 552.147 of the Government Code, the department must withhold the social security numbers we have marked.

In summary, the department must withhold the information we marked under section 552.134 of the Government Code. The department must withhold the e-mail addresses we have marked pursuant to section 552.137. The department must withhold the DD-214 form that it has marked under section 552.140. The department must withhold the information that we have marked pursuant to section 552.117. The department must withhold the Texas driver’s license information that we have marked under section 552.130. The department must withhold the social security numbers we have marked under section 552.147. The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

⁴We note that in Open Records Letter No. 2005-01067 (2005), this office issued a previous determination that authorizes the department to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department under section 552.117(a)(3), regardless of whether the current or former employee complies with section 552.1175, unless the requestor has a right of access to the information or the current or former employee is deceased. *See* Gov’t Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)).

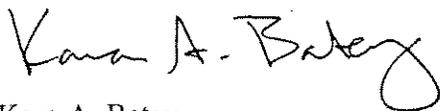
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/krl

Ref: ID# 272373

Enc. Submitted documents

c: Ms. Linda J. Love
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(w/o enclosures)