ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2007

Ms. Cathy Cunningham
Boyle & Lowry, LLP
4201 Wingren, Suite 108
Irving, Texas 75062-2763

OR2007-16406

Dear Ms. Cunningham:

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# 297129.

The City of Keller (the "city"), which you represent, received a request for the personnel file of a named peace officer.[1] You claim that some of the responsive information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.115, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we note that the Texas Comptroller of Public Accounts currently has a lawsuit pending against the Office of the Attorney General that pertains, in part, to individuals' dates of birth: *Tex. Comptroller of Public Accounts v. Abbott*, No. 03-07-00102-CV (Tex. App.—Austin). Accordingly, we do not address your arguments under sections 552.101 and 552.102 with regard to the birth dates the city seeks to withhold. We will allow the trial court to determine whether the dates of birth in the submitted information must be released to the public.

Next, we note that the submitted information includes the peace officer's high school and college transcripts. The United States Department of Education Family Policy Compliance

[1]You state that the requestor has agreed to exclude social security numbers, home addresses, family member information, and medical information from his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). Accordingly, any such information is not responsive to the request and need not be released to the requestor.

Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities 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.[2] Consequently, education records that are responsive to a request for information under the Act should not be submitted to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information").

We note that the city is not an educational agency or institution for purposes of FERPA. In this instance, however, it appears that the city may have obtained the peace officer's transcripts from the educational institutions that created those documents. FERPA contains provisions that govern access to education records that were transferred by an educational agency or institution to a third party. To the extent that the transcripts were obtained from the educational institutions, so as to be governed by FERPA, we will not address the applicability of FERPA to the transcripts, because our office is prohibited from reviewing education records to determine whether appropriate redactions have been made under FERPA. Such determinations under FERPA must be made by the educational authorities from which education records were obtained.[3] Thus, the city should contact any educational institutions from which the transcripts were obtained, as well as the DOE, regarding the applicability of FERPA to the transcripts. To the extent that the transcripts are not governed by FERPA, we will address your remaining arguments against their disclosure.

Next, this office has issued a previous determination allowing all governmental bodies to redact certain personal information of peace officers under section 552.117(a)(2) of the Government Code. *See* Open Records Decision No. 670 (2001) (previous determination that governmental body may withhold home address, home telephone number, personal cellular phone number, personal pager number, social security number and information that reveals whether individual has family members, of any individual who meets definition of "peace officer" set forth in article 2.12 of Texas Code of Criminal Procedure without necessity of requesting attorney general decision as to whether exception under section 552.117(a)(2) applies). Accordingly, the city may withhold information subject to section 552.117(a)(2) without seeking a decision from this office. The city must withhold the telephone numbers we have marked pursuant to section 552.117(a)(2) of the Government Code.

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[2]A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

[3]Accordingly, we also do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA).

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." In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will address your privacy claims under sections 552.101 and 552.102 together.

Common-law privacy 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.*, 540 S.W.2d at 685. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). But this office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, the city must withhold the information we have marked under sections 552.101 and 552.102 in conjunction with common-law privacy.

Section 552.115 of the Government Code excepts from disclosure "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]" Gov't Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration official. *See* Open Records Decision No. 338 (1982). Therefore, because the submitted birth certificate is held by the city, it is not excepted from disclosure under section 552.115.

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.[4] *See* Gov't Code § 552.130(a)(1). The city must withhold the Texas driver's license information we have marked under section 552.130.

Section 552.136 of the Government Code provides in part that "[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."

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[4]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Id. § 552.136(b); *see id.* § 552.136(a) (defining "access device"). The city must withhold the credit card numbers we have marked under section 552.136.

Section 552.137 of the Government Code states in part that "[e]xcept as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Therefore, unless the individuals whose e-mail addresses are at issue consented to release of their e-mail addresses, the city must withhold the e-mail addresses we have marked under section 552.137.

In summary, to the extent that the requestor's educational transcripts were obtained from the educational institutions that created the transcripts, the city should contact any such educational institutions and the DOE regarding the applicability of FERPA to the transcripts. The city must withhold (1) the telephone numbers we have marked under section 552.117(a)(2) of the Government Code, (2) the information we have marked under sections 552.101 and 552.102 of the Government Code in conjunction with common-law privacy, (3) the Texas driver's license information we have marked under section 552.130 of the Government Code, (4) the credit card numbers we have marked under section 552.136 of the Government Code, and (5) the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining submitted information must be released to the requestor.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an challenge, 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).

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,

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/mcf

Ref: ID# 297129

Enc. Submitted documents

c: Mr. Terry Daffron Hickey
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(w/o enclosures)