



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 26, 2009

Ms. Margo M. Kaiser
Staff Attorney
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2009-03944

Dear Ms. Kaiser:

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# 338095 (Texas Workforce Commission Tracking No. 081218-032).

The Texas Workforce Commission (the "commission") received a request for information regarding acceptable levels of expenditure for licensed vocational nurse program certification and the most recent applications from two specified schools. Although you take no position as to whether the information at issue must be released to the requestor, you state that the information at issue may contain proprietary information subject to exception under the Act. Accordingly, you provide documentation showing that the commission notified E & K Vocational Nursing Program, Inc. ("E&K") of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have reviewed the submitted information.

Initially, we note that the requestor seeks information pertaining to two specified schools, while the submitted information only pertains to one school. In this regard, we note your statement to this office that "[the commission] has provided *the third party* whose records were requested with the notice required under section 552.305 of the Government code including copy of the request for information as an attachment to that notice [sic]."

[Emphasis added]. As noted previously, you only provided documentation to this office showing that the commission notified one school whose information was requested, E&K, of the request for information and of its right to submit arguments to this office. You submitted no information demonstrating that the remaining nursing school whose information was requested, identified as "Concord Nursing School" ("Concord") in the request, was notified of the request pursuant to section 552.305, nor do you inform us that information relating to Concord has been released or that the commission maintains no responsive information pertaining to Concord. Accordingly, we understand that, to the extent the commission maintains information pertaining to Concord that is responsive to the request, it has been released to the requestor. If such information has not been released, then it must be released at this time. See Gov't Code §§ 552.301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).¹

Next, with regard to the information submitted as responsive that you describe as a representative sample, we note that section 552.301(e)(1)(D) of the Government Code provides that a governmental body must submit a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested. Here, the requestor seeks "the original and most recent applications, including financials" for the two schools' LVN programs. However, you have submitted only one page of information consisting of the projected budget of E&K for a given quarter, which you describe as "1 page of business financial records filed by [E&K] as part of an application with the Career Schools Division of [the commission]." [Emphasis added]. You do not inform us that any remaining responsive information from E&K's application has been released, or that the requestor has narrowed the request to exclude any such information. Thus, based on our review of the submitted information and the request, we are unable to determine whether the submitted information is truly representative of the requested information as a whole. To the extent the commission holds additional information that is part of an application filed by E&K with the Career Schools Division of the commission and which does not consist of business financial records, the commission has failed to comply with section 552.301(e)(1)(D) concerning such information. Accordingly, such information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." See Gov't Code § 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). Because you have not submitted any remaining requested information pertaining to E&K for our review, we have no basis for finding it

¹However, the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

confidential. Thus, to the extent it exists, we have no choice but to order any such information released pursuant to section 552.302.

With regard to the information you have submitted as responsive to the request, we note that the commission did not request a ruling from this office within ten business days of receiving the request for information. Consequently, we find that the commission failed to comply with the procedural requirements of section 552.301(b) with respect to the submitted information. As noted, pursuant to section 552.302, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302. Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because third party interests can provide a compelling reason to withhold information, we will consider whether or not any of the submitted information may be withheld under the Act.

An interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, E&K has not submitted comments to this office explaining why any portion of the submitted information relating to it should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate its proprietary interests, and none of it may be withheld on this basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret).

However, we note that a portion of the submitted information is subject to section 552.101 of the Government Code.² Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy.³ 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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³Common-law privacy in conjunction with section 552.101 can provide a compelling reason for withholding information for purposes of section 552.302.

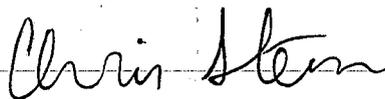
person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to 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. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990).

We find that a portion of the submitted information, which we have marked, is intimate or embarrassing and of no legitimate public concern. Accordingly, the commission must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The remaining information must be released to the requestor.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 338095

Enc. Submitted documents

c: Requestor
(w/o enclosures)