



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 4, 2010

Ms. Elizabeth Y. Brite  
Chief Warrant Officer  
Texas Military Forces  
P.O. Box 5218  
Austin, Texas 78763-5218

OR2010-00001

Dear Ms. Brite:

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# 366253.

The Texas Military Forces (the "military") received a request for seventeen categories of information pertaining to the requestor's client's employment and her age discrimination and wrongful termination claims. You claim the submitted information is excepted from disclosure under sections 552.102, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted any information responsive to categories one, five, seven, eight, nine, eleven, twelve, thirteen, and seventeen of the request for our review. We assume, to the extent information responsive to these portions of the request existed when the military received the request for information, you have released it to the requestor. If not, then you must do so 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).

Next, we must address the military's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling

from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general 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. *See id.* § 552.301(e). In this instance, you state the military received the request for information on October 6, 2009. Accordingly, the military's ten-business-day deadline was October 20, 2009 and the fifteen-business-day deadline was October 27, 2009. However, you did not request a ruling from this office until October 23, 2009. Furthermore, as of the date of this letter, you have not submitted written comments stating the reasons why the stated exceptions apply. Thus, we find the military failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, 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. *See* Open Records Decision No. 150 at 2 (1977). Sections 552.103 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 663 at 5 (1999) (governmental body may waive section 552.111), 470 at 7 (1987) (statutory predecessor to section 552.111 is discretionary exception), 665 at 2 n.5 (2000) (discretionary exceptions in general). Thus, these sections do not constitute compelling reasons to withhold the information for purposes of section 552.302. Therefore, none of the submitted information may be withheld pursuant to section 552.103 or section 552.111. However, because sections 552.102, 552.117, 552.130, and 552.137 can provide compelling reasons to overcome the presumption of openness, we will address whether the submitted information must be withheld from public disclosure under these exceptions.<sup>1</sup>

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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." Gov't Code § 552.102. 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 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 Board*, 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 of the Government Code. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. 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. *See* 540 S.W.2d at 683. We note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions 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); 542 (1990); 470 at 4 (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find none of the submitted information is highly intimate or embarrassing information and the military may not withhold any portion of it under section 552.102(a) of the Government Code on the basis of common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). We note section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 670 at 6 (2001). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We have marked information under section 552.117(a)(1) that consists of the personal information of military job applicants and the cellular telephone number of a military employee. Although the records reflect one of the applicants was hired for a position within the military, you do not inform us whether any

of the remaining applicants were hired by the military. Therefore, the military must withhold the information we have marked under section 552.117(a)(1) of the applicant who was hired for the position at issue, if the applicant made a timely election under section 552.024 and the marked cellular telephone number if the employee at issue pays for the cellular service with personal funds and has elected to keep this information confidential under section 552.024. In regards to the remaining applicants, we must rule conditionally. If an applicant who was hired by the military made a timely election under section 552.024, the military must withhold that applicant's marked information under section 552.117(a)(1). However, the military may not withhold this information under section 552.117(a)(1) if the applicant was not hired or if a timely election was not made under section 552.024.<sup>2</sup>

Section 552.130 of the Government Code exempts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). Accordingly, the military must withhold the Texas driver's license information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code exempts 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). We have marked e-mail addresses that are not of the types specifically excluded by section 552.137(c). Therefore, the military must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, the military must withhold the information relating to the hired applicant we marked under section 552.117 of the Government Code, if the applicant made a timely election under section 552.024. To the extent the remaining applicants were hired by the military and made timely elections under section 552.024, the military must withhold the remaining applicants' marked information under section 552.117(a)(1) of the Government Code. The military must also withhold the Texas driver's license information we marked under section 552.130 of the Government Code and the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses consent to their release.<sup>3</sup> The remaining information must be released.

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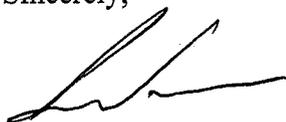
<sup>2</sup>Regardless of the applicability of section 552.117, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

<sup>3</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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](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, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 366253

Enc. Submitted documents

c: Requestor  
(w/o enclosures)