



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 2, 2010

Mr. Marc A. Carmack
Kazen, Meurer & Pérez, L.L.P.
P.O. Box 6237
Laredo, Texas 78042-6237

OR2010-11553

Dear Mr. Carmack:

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# 388947.

The Laredo Community College (the "college"), which you represent, received a request for all documentation related to the dismissal of a named former employee. You state some information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, 552.111, 552.116, 552.117, and 552.135 of the Government Code, and privileged under rule 503 of the Texas Rules of Evidence.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the college's obligations under the Act. Section 552.301 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

¹Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege, this office has concluded section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990)*. In this instance, section 552.107 of the Government Code is the proper exception to claim for the substance of your attorney-client privilege assertion. In addition, although you initially raise section 552.132 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. *See Gov't Code* §§ 552.301, 552.302.

(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 college received the request for information on May 12, 2010. You did not, however, request a ruling from this office until May 28, 2010. Furthermore, you did not submit comments explaining why your stated exceptions apply or a copy of the information requested until June 8, 2010. Thus, we find the college 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 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; *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, 381-82 (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); *see also* Open Records Decision No. 630 (1994). 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). Although you raise sections 552.107, 552.108, 552.111, and 552.116 of the Government Code as exceptions to disclosure of the information at issue and assert the submitted information is privileged under rule 503 of the Texas Rules of Evidence, these exceptions and rule are discretionary in nature. They serve only to protect a governmental body's interests, and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 676 at 10-11 (2002) (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 470 (1987) (statutory predecessor to section 552.111 is discretionary exception), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, no portion of the submitted information may be withheld under section 552.107, section 552.108, section 552.111, section 552.116 of the Government Code, or rule 503 of the Texas Rules of Evidence. However, because sections 552.101, 552.102, 552.117, and 552.135 of the Government Code can provide compelling reasons to withhold information, we will consider the applicability of these exceptions to the submitted information.

You claim some of the submitted information is confidential under section 552.101 of the Government Code in conjunction with the doctrine of common-law privacy and under section 552.102 of the Government Code. Section 552.101 excepts from disclosure

“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. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” *Id.* § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (addressing statutory predecessor). We will, therefore, consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

Common-law privacy protects information that (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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex.1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that an individual’s criminal history when compiled by a governmental body may be protected under common-law privacy. *Cf. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual’s criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find that a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest, and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find that a portion of the submitted information, which we have marked, is highly intimate or embarrassing and not of legitimate public interest. Therefore, the college must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have not provided any arguments explaining the applicability of common-law privacy to the remaining information, which pertains to alleged employee misconduct and criminal behavior. Furthermore, although some of the information may be considered highly intimate or

embarrassing, we find there is a legitimate public interest in information related to the work conduct of the individuals involved. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy or under section 552.102 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether 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). The college may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

We have marked home addresses, home telephone numbers, a social security number, and family information of current or former college employees that may be subject to section 552.117(a)(1). You have not informed us whether any of the employees whose information is at issue timely chose to not allow public access to their personal information. Therefore, if the employees whose information is at issue timely elected to withhold this information, the college must generally withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the employees did not timely elect to withhold this information, then the college may not withhold the marked information under section 552.117(a)(1) of the Government Code.

We note the information we have marked under section 552.117 is contained within college police department law enforcement records. Section 552.117 applies only to records the governmental body is holding in an employment capacity. You have not explained whether or not the college also maintains these law enforcement records separately as administrative records for personnel reasons. Thus, if the college maintains these records as administrative records and the employees timely elected confidentiality, the college must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the college does not maintain these records as administrative records or the employees did not timely elect confidentiality, then the college may not withhold the marked information under section 552.117(a)(1) of the Government Code.

Section 552.135 of the Government Code provides, in relevant part:

(a) "Informer" means a student or a former student or an employee or former employee of a school district who has furnished a report of another person's possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135(a)-(b). You assert some of the remaining information is excepted under section 552.135. By its terms, however, section 552.135 applies to only public school districts and not to colleges or universities. *See Ex Parte Torres*, 943 S.W. 2d 469 (Tex. Crim. App. 1997) (stating if language of statute is not ambiguous, court must give effect to plain meaning of its words unless doing so would lead to absurd results). Accordingly, the college may not withhold any of the remaining information under section 552.135 of the Government Code.

In summary, the college must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The college must also withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code, if the college maintains records at issue as administrative records and the employees timely elected confidentiality.² The remaining information must be released.

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

Sincerely,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

²Regardless 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.

Ref: ID# 388947

Enc. Submitted documents

c: Requestor
(w/o enclosures)