



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 16, 2010

Ms. YuShan Chang
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2010-14068

Dear Ms. Chang:

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#393715.

The Houston Police Department (the "department") received a request for all personnel records pertaining to twelve named officers and all time cards and overtime hours, including payments approved for each of the named officers and each officer's assigned shifts and days off for a specified time period. You have redacted information in accordance with Open Records Decision No. 670 (2001), which is a previous determination by this office authorizing a governmental body to redact information subject to section 552.117(a)(2) of the Government Code.¹ You state the department will make some of the requested information available to the requestor. You claim that the remaining information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note, and you acknowledge, that the department has not complied with the procedural requirements of section 552.301 of the Governmental Code in requesting this ruling. *See id.* § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301

¹ORD 670 allows a governmental body to withhold home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family member information of peace officers under section 552.117 of the Government Code without the necessity of requesting an attorney general decision under section 552.301. ORD 670 at 6.

results in the legal presumption that the information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.301; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *see also* Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by law or affects third party interests. *See* Open Records Decision No. 150 (1977). Because section 552.101 can provide a compelling reason to withhold information, we will consider your arguments regarding this exception.

You seek to withhold the submitted high school and university transcripts as education records under the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, which governs the availability of education records held by educational institutions or agencies receiving federal funds. The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that FERPA 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 department, which maintains the information at issue, is not an educational institution. *See* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth is not an “educational agency” within FERPA). FERPA contains provisions that govern access to education records that were transferred by an educational agency or institution to a third party. You state that the department “believes it received [the transcripts] directly from the educational institution[s].” Further, you state that the transcripts do not indicate they were released to the student before the department obtained them. Based on these representations, we are unable to determine whether or not the department received the transcripts directly from the educational institutions that issued them. Therefore, we must rule conditionally. Because our office is prohibited from reviewing education records to determine whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the transcripts if they were received directly from the educational institutions. Such determinations under FERPA must be made by the educational authorities from which education records were obtained. Therefore, if the department received the transcripts directly from the educational institutions, the department must contact the educational institutions from which the transcripts were obtained, as well as the DOE, regarding the applicability of FERPA to the transcripts. However, if the department did not receive the transcripts directly from the educational institutions that issued them, FERPA does not apply to the transcripts, and they may not be withheld on that basis. As you raise no further

²A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>

exceptions to the disclosure of the transcripts, they must be released if the department did not receive them directly from the educational institutions.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code, which governs access to medical records. Section 159.002 of the Occupations Code provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code. § 159.002(a)-(c); *see also* Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that the consent specifies the (1) information to be covered by the release, (2) reasons or purposes for the release, and (3) person to whom the information is to be released. *See* Occ. Code § § 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We agree that the information you have marked as Exhibit 4 constitutes medical records that may only be disclosed in accordance with the MPA. The department must withhold or release this information in accordance with the MPA.

Section 552.101 also encompasses information protected by common-law privacy. 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. *See 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 demonstrated. *Id.* at 681-82. The types 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 id.* 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. 545 (1990) (deferred compensation

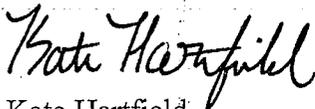
information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information). Upon review, we agree the submitted credit report, which you have labeled Exhibit 3, is highly intimate or embarrassing and of no legitimate public concern. Thus, the department must withhold Exhibit 3 under section 552.101 in conjunction with common-law privacy.

In summary, if the department received the transcripts directly from the educational institutions that issued them, the department must contact the educational institutions from which the submitted transcripts were obtained, as well as the DOE, regarding the applicability of FERPA to the transcripts. If the department did not receive the transcripts directly from the educational institutions, the transcripts must be released. The department must withhold or release Exhibit 4 in accordance with the MPA. The department must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with common-law privacy.

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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 393715

Enc. Submitted documents

c: Requestor
(w/o enclosures)