



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2010

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2010-15147

Dear Ms. Byles:

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# 394110.

The City of Fort Worth (the "city") received a request for (1) the tax status of CRES Management; (2) a "file transferred over from [the United States Department of Housing and Urban Development ("HUD")] and the procedures for that transfer;" and (3) the last 110 files transferred to the city's Department of Community Relations (the "CRD") by HUD region VI. You state some of the files requested in category three have been destroyed according to the city's record retention policy and HUD's records maintenance guidelines.¹ You claim the existing requested housing discrimination complaint investigation files in category three are excepted from disclosure under section 552.101 of the Government Code. You also notified HUD of this request for information and of its right to submit arguments to this office as to why the requested information should not be released. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released). As of the date of this letter, we have not received comments from HUD explaining why the requested information should not be released. We have considered the exception you claim and reviewed the submitted representative sample of information.² We have also received and considered comments submitted by the requestor. *See id.*

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we note you have not submitted information responsive to categories one and two of the request. To the extent information responsive to those parts of the request existed on the date the city received the request, we assume you have released it. If you have not released any such information, 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).

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make confidential. You contend section 115.308(c) of title 24 of the Code of Federal Regulations prohibits the disclosure of the requested housing discrimination files. Section 115.308(c) applies to state and local fair housing enforcement agencies and provides:

(c) The agency will permit reasonable public access to its records consistent with the jurisdiction's requirements for release of information. Documents relevant to the agency's participation in the [Fair Housing Assistance Program ("FHAP")] must be made available at the agency's office during normal working hours (except that documents with respect to ongoing fair housing complaint investigations are exempt from public review *consistent with federal and/or state law*).

24 C.F.R. § 115.308(c) (emphasis added). In this instance, the CRD is an agency for the purposes of section 115.308(c). *See id.* § 115.307 (providing requirements for participation in the FHAP). Section 115.308(c) states the CRD will permit public access to its records consistent with the jurisdiction's public disclosure requirements. Thus, the CRD's records are subject to the Act's requirements for public disclosure. Section 115.308(c) also states the CRD's *ongoing* fair housing complaint investigation files are available for public review unless they are otherwise excepted under federal and/or state law. The provision, however, does not make the CRD's ongoing investigation files confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). You inform us some of the investigation files at issue are closed, while others are still ongoing. You claim all the files are confidential in their entirety under section 552a of title 5 of the United States Code, also known as the federal Privacy Act, and section 552(b)(7) of title 5 of the United States Code, which is a provision of the federal Freedom of Information Act ("FOIA").³

³In your brief, you assert section 552(7)(A) of title 24 of the United States Code for the information at issue. We note, however, this statute does not exist. Based on the statutory language you quoted, we understand you to assert section 552(b)(7) of title 5 of the United States Code.

The Privacy Act and FOIA apply to an "agency," which is defined as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]" See 5 U.S.C. §§ 552(f)(1)(formerly 5 U.S.C. § 552(e)), 552a(a)(1) (referring to 5 U.S.C. § 552(e) for definition of "agency"). In this instance, the information at issue was created, and is maintained by the city. Our office and the courts have stated FOIA and the Privacy Act apply only to federal agencies and not to state or local agencies. See *St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of agency under Privacy Act does not encompass state agencies or bodies); *Shields v. Shetler*, 682 F.Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies); *Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); Attorney General Opinion MW-95 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). You assert, in this instance, the Privacy Act applies to the information "because [the CRD] administers the [FHAP] on behalf of [HUD] and the [FHAP] is subject to HUD regulations." The courts have opined, however, that neither the receipt of federal funds nor limited oversight by a federal entity convert state or local governmental bodies into agencies covered by the Privacy Act. See *St. Michael's Convalescent Hosp.*, 643 F.2d at 1373-74; see also *United States v. Orleans*, 425 U.S. 807, 816, 96 S.Ct. 1971, 1976, 48 L.Ed.2d 390 (1976) (stating federal regulations and contract provisions do not convert acts of local and state governmental bodies into federal governmental acts).

You additionally argue section 552(b)(7) of FOIA prohibits the release of the complaint investigation files because the city processed the discrimination complaints on HUD's behalf and HUD would be prohibited from releasing the information if HUD had processed the discrimination complaints. This office has stated in numerous decisions information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. See Open Records Decision Nos. 561 at 7 n.3 (1990) (federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under the Act), 124 (1976) (fact information held by federal agency excepted under FOIA does not make same information excepted under the Act when held by Texas agency), 59 (1974). Therefore, you have failed to demonstrate the Privacy Act or FOIA applies to the city. Accordingly, no portion of the submitted information may be withheld on these bases.

You contend some of the information at issue is excepted from disclosure pursuant to section 21.305 of the Labor Code, which is also encompassed by section 552.101. Section 21.305 concerns the release of Texas Workforce Commission (the "commission") records to a party of a complaint filed under section 21.201 of the Labor Code. Section 21.201 pertains to employment discrimination complaints filed with the commission. In this instance, the information at issue pertains to housing discrimination complaints filed with the CRD or HUD. Therefore, we find you have failed to demonstrate the applicability

of section 21.305 of the Labor Code to the information at issue, and the information may not be withheld under section 552.101 of the Government Code on that basis.

We note the submitted information contains information that may be excepted under common-law privacy, as well as sections 552.130 and 552.136 of the Government Code.⁴ Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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. 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. The type of information considered highly intimate or 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. *Id.* at 683. This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Furthermore, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision No. 545 (1990). We have marked medical and financial information that is not of legitimate public concern. The city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The remaining information contains copies of a Texas driver's license, Texas driver's license numbers, and a Texas license plate number. Thus, the city must withhold this information, which we have marked, under section 552.130 of the Government Code.⁵

The remaining information contains a customer's utility account number. Section 552.136 of the Government Code states "[n]otwithstanding any other provision of this chapter, 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." *Id.* § 552.136(b); *see also id.*

⁴The 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).

⁵We 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 and license plate numbers and a copy of a Texas driver's license under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

§ 552.136(a) (defining “access device”). We find the utility account number constitutes an access device number for purposes of section 552.136. Thus, the city must withhold the account number we have marked under section 552.136 of the Government Code.

In summary, the city must withhold the marked medical and financial information under section 552.101 of the Government Code in conjunction with common-law privacy; Texas motor vehicle record information under section 552.130 of the Government Code; and account number under section 552.136 of the Government Code. The remaining information must be released.⁶

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 394110

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁶We note the remaining information includes social security numbers. 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.