ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2010

Mr. Mark Sokolow
City Attorney
City of Georgetown
P.O. Box 409
Georgetown, Texas 78627-0409

OR2010-15660

Dear Mr. Sokolow:

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#395291.

The City of Georgetown (the "city") received two requests for specified information pertaining to job posting number 0800078 for the assistant city attorney position and the applicants for that job posting. You state the city has released a list of the job applicants and the original job posting to one of the requestors. You also state that the city does not have any information responsive to the request for drafts of the job posting.[1] You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, and 552.137 of the Government Code. You also indicate that release of the submitted information may implicate the privacy interests of the individuals who applied for the assistant city attorney position (collectively, the "applicants"). Accordingly, we understand that you notified the applicants of the request and of their right to submit arguments to this office as to why their information should not be released. *See*

[1]The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released). We have received arguments from seven of the applicants. We have considered the submitted arguments and reviewed the submitted information.[2]

The city and several of the applicants raise section 552.102(a) of the Government Code for portions of the requested information. 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(a) protects information relating to public officials and employees. *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). Section 552.102 only applies to information in a personnel file of an employee of a governmental body. We note that the city has informed this office that only one of the individuals whose information is at issue has ever been employed by the city. As such, only that individual's information would be contained in a personnel file of a city employee held by the city. Since the remaining individuals were never employed by the city, section 552.102(a) does not apply to their information.

We note, however, that section 552.102(a) utilizes the same test as the test for common-law privacy under section 552.101 of the Government Code, which can protect private individuals. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The city and several of the third parties also raise section 552.101 in conjunction with common-law privacy. Accordingly, we will address all of the common-law privacy claims under section 552.101. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) 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. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note that names, addresses, telephone numbers, educational history and work background of individuals are not highly intimate or embarrassing. *See* Open Records Decision No. 455 at 7 (1987) (names and addresses are not protected by privacy). We also note dates of birth are not highly intimate or embarrassing information. *See Tex.*

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[2]We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Comptroller of Public Accounts v. Attorney Gen. of Tex., 244 S.W.3d 629 (Tex. App.—2008, pet. granted) ("We hold that date-of-birth information is not confidential[.]"); *see also* Attorney General Opinion MW-283 (1980) (public employee's date of birth not protected under privacy); ORD 455 at 7 (birth dates not protected by privacy). Further, this office has stated that there is a legitimate public interest in the qualifications of persons who seek public employment, as well as the hiring practices of governmental entities. *See generally* Open Records Decisions Nos. 542 at 5 (1990) (information regarding the qualifications of a public employee is of legitimate concern to the public); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 455 at 9 (1987) (public has a legitimate interest in knowing applicants' past employment record and their suitability for the employment position in question).

The city seeks to withhold the applicants' references, some of the applicants' addresses and telephone numbers, and some of the applicants' salary information under common-law privacy. In addition, some of the applicants argue that various information, including their driver's license numbers, home addresses, home telephone numbers, dates of birth, social security numbers, e-mail addresses, work histories, resumes, name and contact information for professional references, and written correspondence are confidential pursuant to common-law privacy. Finally, one of the applicant's argues that his entire application file is subject to common-law privacy. Upon review, we find that all of the submitted information relates to the hiring practices and hiring decisions of the city and is of legitimate public interest. Therefore, the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

One of the applicants argues that his information is confidential pursuant to the doctrine of constitutional privacy, which is also encompassed by section 552.101 of the Government Code and protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we conclude the applicant at issue has not shown that any of his information comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444 (1986), 423 at 2 (1984). Accordingly, none of the information at issue may be withheld under section 552.101 in conjunction with constitutional privacy.

One of the applicants claims his educational information is excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information from transcripts of professional public school employees other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). Upon review, none of the submitted information consists of a transcript of professional public school employee. Thus, the city may not withhold any of the submitted information under section 552.102(b) of the Government Code.

One of the applicants claims that some of his information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm). We find the applicant at issue has made only conclusory allegations that the release of his information would result in substantial damage to his competitive position. Thus, the applicant has not demonstrated that substantial competitive injury would result from the release of any of his information. *See* Open Records Decision Nos. 661, 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of the submitted information at issue may be withheld under section 552.110(b).

The city and some of the applicants claim that some of the remaining information is protected under section 552.117 of the Government Code. Section 552.117(a)(1) 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). We note section 552.117 is only applicable to a current or former employee of a Texas governmental body; therefore, section 552.117 does not apply to information pertaining to a current or former federal employee. *See* Gov't Code § 552.003(1) (defining governmental body for purposes of the Act). Section 552.117 applies only to records the governmental body is holding in an employment capacity. We also note that section 552.117(a)(1) is not applicable to information relating to an applicant for employment who did not become an employee. *See* Open Records Decision No. 455 at 2 (1987). The city has informed this office that at the time of the request only one of the applicants at issue qualified as a former or current employee or official of the city. Accordingly, we find that section 552.117 does not apply to the information pertaining to the applicants who are not current or former employees or officials of the city and none of their information may be withheld on that basis.

The city has marked the home address and telephone numbers of the individual who the city informs us is a current employee of the city. 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 city 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 note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). You have not informed us whether or not the employee whose home address and telephone numbers are at issue chose to withhold her personal information prior to the city's receipt of the request for information. Therefore, if the employee timely elected to withhold her home address and telephone number, the city must withhold the information it has marked under section 552.117(a)(1) of the Government Code. If the employee did not timely elect to withhold her personal information, then the city may not withhold the marked information under section 552.117(a)(1) of the Government Code. In addition, if the marked telephone numbers consist of business telephone numbers or cellular telephone numbers paid for by a governmental body, they may not be withheld under section 552.117(a)(1).

One of the applicants claims that some of his information may fall under sections 552.117 and 552.1175 of the Government Code. We note this applicant's information is held by the city in conjunction with its hiring process and not as the employer of the applicant at issue. Accordingly, section 552.117 is not applicable to the personal information contained in this applicant's application and resume. However, this information may be excepted from disclosure under section 552.1175, which provides in part:

> (a) This section applies only to:
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> > (1) peace officers as defined by Article 2.12, Code of Criminal Procedure; [and]
> >
> > . . .
> >
> > (3) current or former employees of the Texas Department of Criminal Justice or of the predecessor in function of the department or any division of the department[.]
>
> (b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

> (1) chooses to restrict public access to the information; and
>
> (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (3), (b). We note that an individual's personal post office box number is not a "home address" for purposes of section 552.1175, and therefore may not be withheld under this section. *See* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied). We also note section 552.1175 is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). The applicant at issue states that he is "a former employee of the Texas Department of Criminal Justice and . . . currently a reserve peace officer for the Bee County Sheriff's Office." Therefore, to the extent that the individual whose cellular telephone we have marked elects to restrict access to this information in accordance with section 552.1175(b) and the cellular telephone service is not paid for by a governmental body, the city must withhold it under section 552.1175 of the Government Code.[3] If the individual does not elect to restrict access to the information we have marked, then the department may not withhold this information under section 552.1175.

The city and several of the applicants claim some of the remaining information is excepted under section 552.130 of the Government Code. Section 552.130 excepts from public 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). We note that section 552.130 does not apply to out-of-state motor vehicle record information. Upon review, we find the city must withhold the Texas driver's license numbers, driver's license expiration dates, and driver's license class designations we have marked under section 552.130 of the Government Code. However, the remaining information the city has marked is not excepted from disclosure under section 552.130 and may not be withheld on that basis.

The city and some of the applicants claim the e-mail addresses in the remaining information are excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 excepts 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). Upon review, we find the city must withhold the personal e-mail addresses it has marked under section 552.137 of the Government Code, in addition to the e-mail addresses we have marked, unless the owners of the addresses have affirmatively consented to their public disclosure.

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[3]We note that although this applicant has informed this office that he requests that his information be withheld, section 552.1175(b) requires that the applicant make such election to the city on a form provided by the city, along with evidence of his status. Gov't Code § 552.1175(b).

Several of the applicants claim section 552.147 of the Government Code for their social security numbers. Section 552.147 provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. We note, however, that none of the submitted documents contain social security numbers. Accordingly, none of the submitted information may be withheld based on section 552.147.

In summary, if the employee at issue timely elected to withhold her home address and telephone number, the city must withhold the information it has marked under section 552.117(a)(1) of the Government Code. To the extent that the individual whose cellular telephone we have marked elects to restrict access to this information in accordance with section 552.1175(b) and the cellular telephone service is not paid for by a governmental body, the city must withhold it under section 552.1175 of the Government Code. The city must withhold the information we have marked under section 552.130 of the Government Code. The city must withhold the personal e-mail addresses it has marked under section 552.137 of the Government Code, in addition to the e-mail addresses we have marked, unless the owners of the addresses have affirmatively consented to their public disclosure.[4] As no further exceptions to disclosure are raised, 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,

Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/eb

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[4]This office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies, which authorizes withholding of ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code and the e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 395291

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Briefing third parties
(w/o enclosures)