



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 25, 2011

Major Sonya Batchelor  
Attorney Advisor  
Adjutant General's Department  
P.O. Box 5218  
Austin, Texas 78763-5218

OR2011-05661

Dear Major Batchelor:

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# 415177 (Case No. 2010-05639-F).

The Texas National Guard (the "National Guard") received a request for full disclosure of two specified Command Directed Investigations. You have redacted the social security numbers of individuals other than the requestor pursuant to section 552.147 of the Government Code.<sup>1</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the National Guard'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), 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). In this instance, you state the National Guard received the request for information on June 23, 2010. However, you did not request a ruling from this

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<sup>1</sup>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 an attorney general decision under the Act. Gov't Code § 552.147(b).

office until February 14, 2011. Thus, we find the National Guard 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 assert portions of the submitted records are excepted under sections 552.107 and 552.111 of the Government Code, these sections 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 11-12 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 6-7 (1987) (statutory predecessor to section 552.111 is discretionary exception). Furthermore, you provide no arguments explaining why sections 552.107 and 552.111 apply to the information you marked under these exceptions. *See* Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Thus, no portion of the submitted information may be withheld under sections 552.107 and 552.111 of the Government Code. However, because section 552.101 of the Government Code can provide compelling reasons to withhold information, we will consider the applicability of this exception to the submitted information.

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. This section 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 excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 455 (1987)

(prescription drugs, illnesses, operations, and physical handicaps). We have marked medical information that is not of legitimate public interest. We have also marked information that is highly intimate or embarrassing and is of no legitimate public interest. Thus, the National Guard must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have failed to demonstrate how the remaining information you marked is protected by common-law privacy. Therefore, none of this information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1).<sup>2</sup> We note that section 552.117 is also applicable to an employee's personal cellular phone number if the employee pays for the cellular phone service. *See Open Records Decision No. 506 at 5-6 (1988)*. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for information. *See Open Record Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Accordingly, if the employees did not timely elect confidentiality, their personal information may not be withheld under section 552.117(a)(1) of the Government Code. If, however, the employees timely elected to keep this information confidential, the National Guard must withhold the information we marked under section 552.117(a)(1). Furthermore, if the employee cellular phone numbers we marked are the personal cellular phone numbers of employees who timely elected confidentiality, they must be withheld under section 552.117(a)(1). In addition, to the extent the identifying information we marked in red is not protected under section 552.117(a)(1), the National Guard must withhold the medical information we marked in green under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the identifying information we marked in red is excepted under section 552.117(a)(1), that person's privacy is protected by our markings under that exception and the medical information we marked in green must be released.

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." *Gov't Code* § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

& *The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Accordingly, the marked birth dates must be withheld under section 552.102(a) of the Government Code.

Finally, section 552.137 of the Government Code 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 email address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The submitted records contain e-mail addresses that are not specifically excluded by section 552.137(c). As such, unless the owners of the e-mail addresses we marked have affirmatively consented to their release, they must be withheld under section 552.137 of the Government Code. *See id.* § 552.137(b). As you raise no further exceptions to disclosure, the remaining information must be released.<sup>3</sup>

In summary, the marked birth dates must be withheld under section 552.102(a) of the Government Code. If the employees timely elected to keep their personal information confidential, the National Guard must withhold the information we marked under section 552.117(a)(1) of the Government Code. If the employees did not timely elect confidentiality, their personal information may not be withheld under section 552.117(a)(1). To the extent the personal information we marked in red is not protected under section 552.117(a)(1), the National Guard must withhold the medical information we marked in green under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we marked in red is excepted under section 552.117(a)(1), the medical information we marked in green must be released. The remaining information we marked under section 552.101 in conjunction with common-law privacy must be withheld. Lastly, unless the owners of the e-mail addresses we marked have affirmatively consented to their release, they must be withheld under section 552.137 of the Government Code. 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.

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<sup>3</sup>The submitted records contain information about the requestor or his representative that would be protected from public disclosure by laws and exceptions enacted to protect personal privacy. The requestor has a right of access to this private information in accordance with section 552.023 of the Government Code. *See* Gov’t Code § 552.023(a) (person or person’s authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person’s privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide her with information concerning herself). However, if the National Guard receives another request for this particular information from a different requestor, then it should again seek a decision from this office.

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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/eeg

Ref: ID# 415177

Enc. Submitted documents

c: Requestor  
(w/o enclosures)