



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 22, 2011

Ms. Jessica L. Saldivar
Assistant General Counsel
Houston Community College
P.O. Box 667517
Houston, Texas 77266

OR2011-17257

Dear Ms. Saldivar:

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# 436944.

Houston Community College (the "college") received a request for the entire personnel file of a named individual.¹ You state the college has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor.² *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

¹We note the college received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purposes of clarifying or narrowing request for information).

²We note the requestor asserts the copy of the written comments sent to her were excessively redacted and conceal the arguments the college has made to this office. Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business days of receiving the written request. Gov't Code § 552.301(e-1). Regardless of whether the college failed to meet its section 552.301(e-1) requirement, sections 552.101 and 552.102 of the Government Code are mandatory exceptions that constitute compelling reasons sufficient to overcome the presumption of openness caused by the failure to comply with section 552.301. *See id.* at §§ 552.007, .352.

Initially, we note social security numbers, medical information, bank account information, driver's license information, transcript information, personal financial information, letters of recommendation provided under an express promise of confidentiality, and residential addresses, phone numbers, and e-mail addresses, provided the named employee requested confidentiality of his home addresses, phone numbers, and e-mail address, are not responsive to the present request for information because the requestor has agreed to their redaction. We have marked non-responsive information. This ruling does not address the public availability of any information that is not responsive to the present request, and the college need not release such information to the requestor.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355(a). This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, we determined for purposes of section 21.355, the word "administrator" in section 21.355 means a person who is required to, and does in fact, hold an administrator's certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. You state the information at issue consists of evaluations relating to the Director of Maintenance of the college. However, this office has found section 21.355 of the Education Code, which provides for the confidentiality of evaluations of school district teachers and administrators, does not apply to junior or community colleges. Accordingly, the college may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 demonstrated. *See id.* at 681-82. The type 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. *Id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* We note

the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 432 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find a portion of the submitted information, which we have marked, is highly intimate or embarrassing and not of legitimate public interest. However, we are unable to determine whether some of the information is paid for by the college. Thus, we must rule conditionally. If the remaining information we have marked is not paid for by the college, the college must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. If the information at issue is paid by the college, then this information is of legitimate public interest and may not be withheld under common-law privacy. In either case, we find the college must withhold the remaining information we have marked under section 552.101 in conjunction with common-law privacy. However, we find you have failed to demonstrate how any of the remaining information is not of legitimate public interest. Therefore, the college may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

You assert the remaining information is protected by constitutional privacy, which is also encompassed by section 552.101 of the Government Code. Constitutional privacy 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 constitutionally protected interest is an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *See Fado 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*, 765 F.2d at 492). Upon review, we find no portion of the remaining information falls within the zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Accordingly, none of the information at issue may be withheld under section 552.101 in conjunction with constitutional privacy.

Section 552.102(a) of the Government Code 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.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the remaining information, we have marked the information that must be

withheld under section 552.102(a) of the Government Code. However, none of the remaining information is excepted under section 552.102(a), and none of it may be withheld on that basis.

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; if the information we have noted is paid for by the college, it may not be withheld under section 552.101 in conjunction with common-law privacy. The college must withhold the information we have marked under section 552.102(a) 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.

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,



Kirsten Brew
Assistant Attorney General
Open Records Division

KB/ag

Ref: ID# 436944

Enc. Submitted documents

c: Requestor
(w/o enclosures)