



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2012

Ms. Jessica D. Richard
Assistant City Attorney
City of New Braunfels
P.O. Box 311747
New Braunfels, Texas 78131-1747

OR2012-07551

Dear Ms. Richard:

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# 454282.

The City of New Braunfels (the "city") received a request for all personnel records of a named individual. You state some of the requested information has been released. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.152. of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments by the named individual that is the subject of the request. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

The city and the individual that is the subject of the request seek to withhold the submitted information under common-law privacy. 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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release 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 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *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. Common-law privacy also protects certain types of information relating to an investigation of alleged sexual harassment in the workplace. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (public had legitimate interest in affidavit of person under investigation and conclusions of board of inquiry, but not in identities of individual witnesses and details of their personal statements beyond information contained in documents ordered released). We note, however, the public generally has a legitimate interest in information pertaining to the work conduct and job performance of public employees. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (1987) (public employee’s job performance or abilities generally not protected by privacy), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee’s job was performed cannot be said to be of minimal public interest). Upon review, we have marked the information that is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city must withhold this information under section 552.101 in conjunction with common-law privacy. However, you have failed to demonstrate how the submitted information was used in an investigation of alleged sexual harassment. Furthermore, we find that no portion of the remaining submitted information is highly intimate or embarrassing or not of legitimate public interest. Therefore, the city may not withhold any of the remaining information under section 552.101 on this basis.

The individual that is the subject of the request raises 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 protected 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 remaining information may be withheld under section 552.101 in conjunction with constitutional privacy.

The individual that is the subject of the request also raises section 552.102 for the remaining submitted information. 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 has 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. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Thus, under *Texas Comptroller*, section 552.102(a) is applicable to the birth date of an employee of a governmental body in a record maintained by his or her employer in an employment context. Upon review, we find that no portion of the submitted information is subject to section 552.102. Accordingly, the city may not withhold any of the submitted information under section 552.102 of the Government Code.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov’t Code § 552.152. Upon review, we find you have not demonstrated release of the remaining information would subject an employee or officer to a specific substantial risk of physical harm. Accordingly, the city may not withhold the remaining information under section 552.152 of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.¹ Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, 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. *Id.* § 552.117(a)(1). 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 the information. *See* Open Records 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 official or 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 the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. In this instance, the city does not state and the submitted information does not reveal whether the employees listed in the submitted

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information elected to withhold personal information pursuant to section 552.024; thus, we must rule conditionally. To the extent the employees listed in the submitted information timely elected to keep their personal information confidential pursuant to section 552.024, the city must withhold the information we have marked pertaining to these individuals under section 552.117(a)(1). However, the city may not withhold this information under section 552.117(a)(1) if these individuals did not make a timely election to keep their personal information confidential.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the employees listed in the submitted information timely elected to keep their personal information confidential pursuant to section 552.024, the city must withhold their personal information, which we have marked, under section 552.117(a)(1) 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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 454282

Enc. Submitted documents

c: Requestor
(w/o enclosures)