



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 24, 2013

Mr. Leo J. Welder, Jr.
Counsel for the Port of Corpus Christi Authority of Nueces County
Welder Leshin, LLP
800 North Shoreline Boulevard, Suite 300 North
Corpus Christi, Texas 78401

OR2013-12759

Dear Mr. Welder:

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# 494207.

The Port of Corpus Christi Authority of Nueces County (the "authority"), which you represent, received a request for all correspondence to and from authority employees and all records regarding allegations of employment discrimination. You state you have released some information. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-10543 (2013). In Open Records Letter No. 2013-10543, we concluded the authority (1) may withhold the information we marked under section 552.107(1) of the Government Code, (2) must withhold the information we marked under section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*, (3) must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy, (4) to the extent the employee at issue timely elected to keep such information confidential under section 552.024 of the Government Code and the cellular telephone number is paid for with personal funds, must withhold the number we marked under section 552.117(a)(1) of the Government Code; (5) must withhold the information we marked under section 552.117(a)(2) of the Government Code; (6) must

withhold the partial credit card numbers we marked under section 552.136 of the Government Code; (7) must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release, and (8) release the remaining information. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the authority may continue to rely on Open Records Letter No. 2013-10543 as a previous determination and withhold the identical information in accordance with that ruling.¹ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

Next, we must address the authority's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. *See* Gov't Code § 552.301. Pursuant to section 552.301(b) of the Government Code, 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 id.* § 552.301(b). The authority received the request for information on May 6, 2013. Accordingly, the authority's ten-business day deadline was May 20, 2013. While you raised section 552.101 within the ten-business-day time period as required by subsection 552.301(b), you did not raise section 552.102 or section 552.117 until May 24, 2013. Thus, the authority failed to comply with the requirements mandated by subsection 552.301(b) as to its argument under sections 552.102 and 552.117 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 of the Government Code 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. Gov't Code § 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 (Tex. App.—Austin 1990, no writ); *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). However, because sections 552.102 and 552.117 can provide compelling reasons to withhold information from disclosure, we will address the applicability of these sections to the submitted information. We will also consider your timely raised argument against disclosure under section 552.101 of the Government Code.

¹As our ruling is dispositive, we need not address your arguments against disclosure of this 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. Section 552.101 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 satisfied. *Id.* at 681-82. The type of information considered 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. Additionally, information that either identifies or tends to identify a victim of sexual harassment must be withheld under common-law privacy. See Open Records Decision No. 339 at 2 (1982); see also *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). We note the dates of birth of living members of the public are not excepted from required public disclosure under common-law privacy. See Open Records Decision No. 455 at 7 (1987) (home addresses, telephone numbers, dates of birth not protected under privacy). Upon review, we find the information we have marked is highly intimate and embarrassing and not of legitimate public concern. Therefore, the authority must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with common-law privacy.² However, we find, you have failed to demonstrate how any of the remaining information at issue is highly intimate or embarrassing information of no legitimate public interest. Therefore, none of the remaining information you have marked may be withheld under section 552.101 in conjunction with common-law 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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. See *Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find the authority must withhold the date of birth you have marked in the remaining information under section 552.102(a) of the Government Code.

In summary, to the extent any of the requested information was at issue in Open Records Letter No. 2013-10543, the authority may continue to rely on Open Records Letter No. 2013-10543 as a previous determination and withhold and release the identical information in accordance with that ruling. The authority must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The authority must withhold the information you have marked under section 552.102(a) of the Government Code. As you raise no further exceptions to disclosure, 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/som

Ref: ID# 494207

Enc. Submitted documents

c: Requestor
(w/o enclosures)