



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2013

Mr. George Russell Meurer
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Laredo, Texas 78041

OR2013-19487

Dear Mr. Meurer:

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# 505386.

The Laredo Community College (the "college"), which you represent, received a request for (1) the resignation letter submitted by a named individual and related documents and (2) all personnel files related to the named individual. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.114 of the Government Code. Additionally, you provide documentation showing you have notified the named individual of his right to submit comments to this office why some of the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received and considered comments from an attorney for the named individual (the "attorney"). *See id.* We have considered the submitted arguments and reviewed the submitted information.

Initially, you state the college has withheld some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under

the Act.¹ Accordingly, we will not address the applicability of FERPA to the information at issue, except to note records contained in an employee's personnel files are generally not education records subject to FERPA. *See id.* (defining "education records"). However, we will address the applicability of the claimed exceptions to the submitted information.

Next, we must address the college's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See Gov't Code* § 552.301(e). The college received the request for information on August 23, 2013. You do not inform us the college was closed for any business days between August 23, 2013, and September 16, 2013. Accordingly, you were required to provide the information required by subsection 552.301(e) by September 16, 2013.

The college timely submitted some of the requested information within the fifteen-business-day time period as required by subsection 552.301(e)(1)(D) of the Government Code. However, in response to comments from the attorney, the college provided additional information in an envelope bearing a postmark date of October 25, 2013. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). The college argues the documents it submitted on October 25, 2013, are not responsive to the instant request for information because the documents were not maintained in the personnel file of the named individual on the date the request for information was received. We note a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See Open Records Decision No. 561 at 8 (1990)*. Upon review, we agree some of the information at issue, which we have marked, is not responsive to the instant request for information because it does not consist of the specified the resignation letter or related documents and was not maintained in the named individual's personnel file. This ruling does not address the public availability of any information that is not responsive to the request and the college is not required to release such information in response to this request.

However, upon further review, we find the remainder of the documents the college submitted on October 25, 2013, to be responsive to the request because they consist of the specified resignation letter and documents related to that letter. Accordingly, we conclude the college

¹A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

failed to comply with the procedural requirements mandated by section 552.301 of the Government Code with respect to the responsive information that was submitted on October 25, 2013.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (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); *see also* Open Records Decision No. 630 (1994). However, because third-party interests can provide a compelling reason to overcome this presumption, we will address the attorney's arguments against release of the responsive information that was not submitted timely.

Next, the college has redacted portions of the submitted information. You state the college has redacted portions of the submitted information under subsection 552.117(a)(1) of the Government Code as permitted by section 552.024(c) of the Government Code.² The college has also redacted social security numbers under section 552.147(b) of the Government Code.³ However, you have also redacted a date of birth from the submitted documents. You do not assert, nor does our review of the records indicate, you have been authorized to withhold this information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the college should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

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. This exception encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders federal tax return information confidential. *See* Open Records Decision

²Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. *See* Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c).

³Section 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 a decision from this office. *See* Gov't Code § 552.147(b).

No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, the submitted W-4 forms, which we have marked, constitute tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). This office has also 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, 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has found financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. See Open Records Decision Nos. 600 (designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. See ORDs 600, 523. Additionally, this office has concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. See, e.g., Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private). Upon review, we find the information we have marked satisfies the

standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the college must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, in this instance, we find there is a legitimate public interest in portions of the remaining information at issue. Further, we find no portion of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information 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.”⁴ Gov’t Code § 552.102(a). The Texas Supreme Court 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.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we agree the college must withhold the date of birth you redacted under section 552.102(a) of the Government Code.

Section 552.114(a) of the Government Code excepts from disclosure student records “at an educational institution funded wholly or partly by state revenue.” Gov’t Code § 552.114(a). This office has determined the same analysis applies under section 552.114 and FERPA. FERPA governs the availability of student records held by educational institutions or agencies receiving federal funds. We note section 552.114 and FERPA apply only to student records in the custody of an educational institution and records directly transferred from an educational institution to a third party. *See* 34 C.F.R. § 99.33(a)(2). You seek to withhold educational transcripts from other educational institutions that are held by the college as part of an employee’s personnel file. However, you have not demonstrated those transcripts were transferred directly from those institutions to the college. Thus, you have not demonstrated the applicability of section 552.114 or of FERPA. Accordingly, the college may not withhold the employee’s transcripts on the basis of section 552.114 of the Government Code or FERPA.

Some of the remaining information is subject to section 552.117 of the Government Code. Section 552.117(a)(1) 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 or official 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). 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). You have provided documentation demonstrating the individual whose information we have marked

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

made a request for confidentiality under section 552.024 prior to the date the college received the instant request for the information. Therefore, the college must withhold the information we marked under section 552.117(a)(1) of the Government Code.

We now turn to the remaining arguments against disclosure submitted by the attorney. Section 552.101 of the Government Code also encompasses the Americans with Disabilities Act of 1990 (the "ADA"). *See* 42 U.S.C. § 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination" conducted to determine whether an employee is still able to perform the essential functions of his or her job is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). Upon review of the remaining information, we find the attorney has failed to demonstrate the ADA is applicable to any portion of the remaining information, and none of the remaining information may be withheld under section 552.101 on that basis.

The attorney also raises section 552.104 of the Government Code for some of the remaining information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). As the college does not argue section 552.104 is applicable, we will not consider the attorney's claim under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the college may not withhold any of the remaining information under section 552.104 of the Government Code.

Next, the attorney states portions of the remaining information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁵ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information

⁵The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

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 (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).

The attorney asserts portions of the remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude the attorney has failed to establish a *prima facie* case that any portion of the remaining information meets the definition of a trade secret and has not demonstrated the necessary factors to establish a trade secret claim for the remaining information. See ORD 402. Therefore, none of the remaining information may be withheld under section 552.110(a).

The attorney further argues portions of the remaining information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find the attorney has not demonstrated the release of any of the remaining information would result in substantial harm to her client’s competitive position. See ORD 661. Accordingly, none of the remaining information may be withheld under section 552.110(b).

In summary, the college must withhold (1) the marked W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, (2) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy, (3) the date of birth you redacted under section 552.102(a) of the Government Code, and (4) the information we marked under section 552.117(a)(1) of the Government Code. The college must release the remaining responsive information.

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,



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Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 505386

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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