



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 30, 2014

Ms. Cathy Cunningham
Counsel for the City of Keller
Boyle & Lowry, L.L.P.
4201 Wingren Drive, Suite 108
Irving, Texas 75062-2763

OR2014-19576

Dear Ms. Cunningham:

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# 541279 (Nos. 231-14 through 236-14).

The City of Keller (the "city"), which you represent, received requests for the personnel files of six named police officers, including any disciplinary actions, commendations, and officer education transcripts. You state the city has released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the city'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. *See* Gov't Code § 552.301. Section 552.301(e-1) requires a governmental body that submits written comments requesting a ruling to the attorney general under subsection 552.301(e)(1)(A) to send a copy of those comments to the requestor not later than the fifteenth business day after the date of receiving the written request. *Id.* § 552.301(e-1). We note section 552.301(e-1) authorizes a governmental body to redact information from those written comments that discloses or contains the substance of the information requested. *Id.* You state the city did not provide its written comments explaining the exception it claimed to the requestor because the comments discussed confidential information. We note portions of the written comments at issue neither disclose nor contain the substance of the submitted information. Upon

review, we find the city failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

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 the requested information is public and must be released unless the governmental body demonstrates a compelling reason 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 (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 Nos. 630 (1994), 586 (1991), 319 (1982). This office has held a compelling reason exists to withhold information when third-party interests are at stake or when information is made confidential by another source of law. *See* Open Records Decision No. 150 (1977) (construing predecessor statute). Section 552.101 of the Government Code can provide a compelling reason to overcome this presumption. Therefore, we will consider whether this section requires the city to withhold 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 information protected by other statutes. Section 611.002 of the Health and Safety Code provides “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Health & Safety Code § 611.002(a). Section 611.004 of the Health and Safety Code provides in pertinent part:

(a) A professional may disclose confidential information only:

...

(3) to qualified personnel for management audits, financial audits, program evaluations, or research, in accordance with Subsection (b)[.]

(b) Personnel who receive confidential information under Subsection (a)(3) may not directly or indirectly identify or otherwise disclose the identity of a patient in a report or in any other manner.

Id. § 611.004(a)(3), (b). Section 611.004 describes the circumstances under which a “professional” may disclose information made confidential by section 611.002. Section 611.005 of the Health and Safety Code provides:

(a) A person aggrieved by the improper disclosure of or failure to disclose confidential communications or records in violation of this chapter may petition the

district court of the county in which the person resides for appropriate relief, including injunctive relief. The person may petition a district court of Travis County if the person is not a resident of this state.

(b) In a suit contesting the denial of access under Section 611.0045, the burden of proving that the denial was proper is on the professional who denied the access.

(c) The aggrieved person also has a civil cause of action for damages.

Id. § 611.005. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2).

You claim the information you have marked in Exhibit B.1 is confidential pursuant to section 552.101 of the Government Code in conjunction with sections 611.002, 611.004(b), and 611.005 of the Health and Safety Code. Upon review, we find you have failed to demonstrate the information you have marked in Exhibit B.1 consists of “communications between a patient and a professional” or “records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” Accordingly, you have failed to demonstrate the information at issue is confidential under section 552.101 of the Government Code in conjunction with section 611.002, section 611.004(b), or section 611.005 of the Health and Safety Code, and the city may not withhold the information at issue on those bases.

Section 552.101 also encompasses section 143.089 of the Local Government Code. Section 143.089 contemplates two different types of personnel files; a police officer’s civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov’t Code § 143.089(a), (g). Information maintained in a police department’s internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state, to the extent the information you have marked is subject to section 143.089(g) of the Local Government Code, it must be withheld. However, the city is not a civil service city as defined by chapter 143 of the Local Government Code. We note the provisions of chapter 143 of the Local Government Code only apply to civil service cities. Because the city is not a civil service city, section 143.089 is inapplicable to the information at issue, and no portion of the information may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses section 58.007 of the Family Code, which provides in pertinent part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). Juvenile law enforcement records relating to delinquent conduct or conduct indicating a need for supervision that occurred on or after September 1, 1997, are confidential under section 58.007. *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of section 58.007 of the Family Code). For purposes of section 58.007(c), “child” means a person who is ten years of age or older and under seventeen years of age at the time of the conduct at issue. *See id.* § 51.02(2). Upon review, we find you have not demonstrated the information you have marked within the submitted personnel file consists of juvenile law enforcement records related to delinquent conduct or conduct indicating a need for supervision that occurred after September 1, 1997. Thus, we find the city has failed to demonstrate the applicability of section 58.007 to the information at issue, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 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. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See Open Records Decision No. 600 (1992)* (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, protected under common-law privacy). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See Open Records Decision No. 455 (1987)*. However, we note information obtained by a law

enforcement agency in the process of hiring a peace officer is a matter of legitimate public interest, and the public has a legitimate interest in information relating to those who are involved in law enforcement. *See* 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) (public has legitimate interest in job qualifications and performance of public employees), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of law enforcement 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 find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.¹ However, we find you have failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the remaining information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home addresses, current and former home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code.² Gov't Code § 552.117(a)(2). Thus, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.³

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. The city must also withhold the information we have marked under section 552.117(a)(2) 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.

¹As our ruling is dispositive of the information you have marked, we need not address your remaining argument against its disclosure.

²"Peace officer" is defined by article 2.12 of the Texas Code of Criminal Procedure.

³The 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).

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,



Alley Latham
Assistant Attorney General
Open Records Division

AKL/dls

Ref: ID# 541279

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)