



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2014

Ms. Alexis G. Allen
Counsel for the City of Red Oak
Nichols, Jackson, Dillard, Hager & Smith, LLP
500 North Akard Street
Dallas, Texas 75201

OR2014-23140

Dear Ms. Allen:

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# 547738 (City of Red Oak Ref. No. 68646).

The City of Red Oak (the "city"), which you represent, received a request for information related to eight named individuals, including the requestor. You state you have released some information to the requestor. You state you will redact information subject to section 552.147(b) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.117, 552.130, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving the request, the governmental

¹Section 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. Gov't Code § 552.147(b).

²Although you raise section 552.111 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the requested information. See Gov't Code §§ 552.301, .302.

body must request a ruling from this office and state the exceptions to disclosure that apply. *See* Gov't Code § 552.301(b). You state you received the instant request on October 1, 2014. This office does not count the date the request was received for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the city was required to provide the information required by section 552.301(b) by October 15, 2014. Although you raised sections 552.101, 552.102, 552.117, 552.130, and 552.137 within the ten-business-day time period as required by subsection 552.301(b), you did not raise section 552.107 until October 20, 2014. Consequently, as to your argument under section 552.107, we find you did not comply with 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 that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *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); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.107 of the Government Code is a discretionary exception to disclosure that protects only a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 12 (2002) (attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party), 522 (1989) (discretionary exceptions in general). As such, section 552.107 does not constitute a compelling reason to withhold information for purposes of section 552.302. Therefore, in failing to comply with the requirements of section 552.301, you have waived your claim under section 552.107. However, we will address the applicability of the timely raised exceptions to 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. Section 552.101 encompasses information protected by statutes, including the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101-12213. The ADA provides a covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of the applicant and may condition an offer of employment on the results of the examination, provided 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. *See* 42 U.S.C. § 12112(d)(3)(B); *see also* 29 C.F.R. § 1630.14(b); Open Records Decision

No. 641 (1996). Thus, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA.³

Section 552.101 of the Government Code also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. You seek to withhold some of the remaining information under the MPA. We note some of this information consists of reports of the results of drug tests. Section 159.001 of the MPA defines "patient" as "a person who, to receive medical care, consults with or is seen by a physician." *Id.* § 159.001(3). Because the individuals at issue in the reports did not receive medical care in the administration of the drug tests, these individuals are not patients for purposes of section 159.002. Furthermore, we find the city has failed to demonstrate any portion of the remaining information consists of a physician-patient communication or a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. Therefore, no portion of the remaining information may be withheld under section 552.101 in conjunction with the MPA.

We note the remaining information includes federal tax return information. Section 552.101 of the Government Code also encompasses section 6103 of title 26 of the United States

³As our ruling is dispositive, we do not address your other arguments to withhold this information.

Code, which makes federal income tax return information confidential. *See* 26 U.S.C. § 6103(a); Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Thus, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States 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.

We understand you to assert portions of the submitted information are confidential under common-law privacy on the basis of Open Records Decision No. 594 (1991), in which this office concluded public employees may have a privacy interest in their drug test results. *See* ORD 594 (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (1987) (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d. 1136 (3rd Cir. 1986)). We note some of the submitted information pertains to the results of drug tests administered to city employees. We further note information involving public officials and employees and public employment is generally not private because the public has a legitimate interest in such information. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 5 (1986) (public has legitimate interest in knowing reasons for public employee's dismissal, demotion, or promotion), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private).

We also note the doctrine of common-law privacy protects a compilation of an individual's criminal history, which is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, we note records relating to

routine traffic violations are not considered criminal history information. *Cf.* Gov't Code § 411.082(2)(B) (criminal history record information does not include driving record information). Furthermore, criminal history information provided by a public employee as part of an application for employment with a governmental body was not compiled by any governmental body. Additionally, as noted above, there is a legitimate public interest in information relating to applicants and employees of governmental bodies and their employment qualifications and job performance. *See* ORDs 562 at 10, 470 at 4, 444, 423 at 2.

Upon review, we find information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the city has failed to demonstrate how any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* 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 v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find no portion of the submitted information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Consequently, the city may not withhold any of the information at issue under section 552.101 in conjunction with constitutional privacy.

Section 552.102 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. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the city must withhold the dates of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a). Section 552.117 is applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former 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. Therefore, to the extent the employees whose information is at issue timely elected confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold cellular telephone numbers under section 552.117(a)(1) if the cellular telephone service was not paid for by a governmental body. To the extent the employees at issue did not make timely elections under section 552.024, this information may not be withheld under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country. Gov't Code § 552.130(a). Accordingly, the city must withhold the information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Thus, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code. 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 withhold the dates of birth we have marked under section 552.102(a) of the Government Code. To the extent the employees whose information is at issue timely elected confidentiality under section 552.024, the city must withhold the

information we have marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold cellular telephone numbers under section 552.117(a)(1) if the cellular telephone service was not paid for by a governmental body. The city must withhold the information we have marked under section 552.130 of the Government Code. The city must withhold the information we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release. 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,



Joseph Behrke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 547738

Enc. Submitted documents

c: Requestor
(w/o enclosures)