



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 12, 2016

Ms. Ana Vieira Ayala
Assistant General Counsel
The University of Texas System
201 West 7th Street, Suite 600
Austin, Texas 78701-2901

OR2016-27463

Dear Ms. Ayala:

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# 637359 (OGC# 172061).

The University of Texas Medical Branch at Galveston (the "university") received a request for personnel information pertaining to three named employees for a range of dates. You state you will release some information. You state release of the submitted information may implicate the proprietary interests of Kaufman, Hall & Associates, Inc. ("Kaufman Hall") and the privacy interests of one of the named employees (the "named individual"). Accordingly, you state, and provide documentation showing, you notified Kaufman Hall and the named individual of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code §§ 552.304, 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received and considered comments submitted by an attorney on behalf of the named individual. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). The university claims some of the submitted information is excepted from disclosure under section 552.111 of the Government Code.

Initially, we note some of the submitted information is not responsive to the present request because it does not pertain to any of the information requested by the requestor. This ruling does not address the public availability of the non-responsive information and the university need not release it in response to this request. As the information for which the university claims section 552.111 is non-responsive, we do not address your argument under this exception.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Kaufman Hall explaining why the submitted information should not be released. Therefore, we have no basis to conclude the third party has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold the submitted information on the basis of any proprietary interest Kaufman Hall may have in the information.

The named individual asserts portions of her information are private.¹ 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, 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. The named individual claims the requested information contains private information not intended for public disclosure and in which there is no legitimate public interest. The named individual argues release of the information at issue would constitute an embarrassing and unwarranted invasion of personal privacy. However, the public generally has a legitimate interest in information relating to public job applicants, public employees, and their employment qualifications and job performance. *See* Open Records Decision Nos. 542 (1990), 470 at 4

¹While the named individual raises sections 552.305 and 552.022 of the Government Code, we note these sections are not exceptions to disclosure under the Act. *See* Gov't Code §§ 552.022 (enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under the Act or other law), .305. The named individual also raises section 552.111 of the Government Code; however, we note section 552.111 protects the interests of governmental bodies and not third parties. *See id.* § 552.111.

(1987) (public has legitimate interest in job qualifications and performance of public employees), 455 at 9 (1987) (employment applicant's salary information not private), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation or public employees), 432 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the named individual has failed to demonstrate the information at issue meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the university may not withhold any of the information at issue under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.101 of the Government Code also encompasses constitutional privacy, which 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)). After review of the information at issue, we find the named individual has failed to demonstrate any portion of the information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the university may not withhold any of the information at issue under section 552.101 on the basis of constitutional 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). The named individual asserts 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*, 354 S.W.3d 336. Upon review, we find the named individual has failed to demonstrate any of the information at issue is subject to section 552.102(a) of the Government Code. Accordingly, the university may not withhold any of the information at issue under section 552.102(a) of the Government Code. Accordingly, the submitted 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,



April Philley
Assistant Attorney General
Open Records Division

AP/akg

Ref: ID# 637359

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)