



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 13, 2020

Mr. Barry L. Macha
General Counsel
Midwestern State University
3410 Taft Boulevard
Wichita Falls, Texas 76308-2099

OR2020-25539

Dear Mr. Macha:

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# 848407.

Midwestern State University (the "university") received three requests from the same requestor for incident reports and personnel documents involving a named university employee.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.114, 552.115, 552.117, 552.130, 552.143, 552.147, and 552.152 of the Government Code.² Additionally, you state release of the submitted information may implicate the privacy interests of named individuals. Accordingly, you state, and provide documentation showing, the university notified the individuals at issue of the request for information pursuant to section 552.304 of the Government Code. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have received comments from the individuals at issue. We have also received and considered comments

¹ You state the university sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² Although you do not raise section 552.143 of the Government Code in your brief, we understand the university to assert this exception based on your markings.

submitted by the requestor. *See id.* We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.³ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You state you have submitted education records for our review. However, some of the information at issue was created by the university’s police department (the “department”) for a law enforcement purpose. FERPA is not applicable to law enforcement records maintained by the department that were created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, 99.8. Some of the information at issue relates to criminal investigations by the department. Thus, these records are not subject to FERPA, and no portion of these records may be withheld on that basis. However, because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the remaining records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. Likewise, we do not address your argument under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into Act), .114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining same analysis applies under section 552.114 of Government Code and FERPA). However, we will consider your remaining arguments against disclosure of the submitted information.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state report numbers 2018-000275, 19-0113, and 19-0214 pertain to active criminal investigations of the department. Based on this representation, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—

³ A copy of this letter may be found on the Office of the Attorney General’s website at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to report numbers 2018-000275, 19-0113, and 19-0214.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state report number 20-0045 pertains to a closed investigation conducted by the department that did not result in conviction or deferred adjudication. Based on this representation, we agree section 552.108(a)(2) is applicable to report number 20-0045.

However, we note section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). We note basic information includes the identity of the complainant but not the home address or telephone number of the complainant. *See* ORD 127 at 3-4. Thus, with the exception of the basic information, which must be released, the university may withhold report numbers 2018-000275, 19-0113, and 19-0214 under section 552.108(a)(1) of the Government Code and may withhold report number 20-0045 under section 552.108(a)(2) of the Government Code.⁴

Section 552.101 of the Government Code excepts “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 other statutes. Section 51.971 of the Education Code provides, in pertinent part, the following:

(a) In this section:

(1) “Compliance program” means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:

(A) ethics and standards of conduct;

(B) financial reporting;

(C) internal accounting controls; or

⁴ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(D) auditing.

(2) “Institution of higher education” has the meaning assigned by Section 61.003.

...

(e) Information is excepted from disclosure under [the Act] if it is collected or produced:

(1) in a compliance program investigation and releasing the information would interfere with an ongoing compliance investigation[.]”

Educ. Code § 51.971(a), (e)(1). One of the named individuals argues some of the remaining information is confidential pursuant to section 552.101 of the Government Code in conjunction with section 51.971(e) of the Education Code. However, upon review, we find the individual at issue has failed to demonstrate any portion of the remaining information pertains to the university’s compliance program for purposes of section 51.971. *See id.* § 51.971(a). Accordingly, the university may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 51.971(e) of the Education Code.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which pertains to criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code makes CHRI the Texas Department of Public Safety (“DPS”) maintains confidential, except DPS may disseminate this information as provided in subchapters E-1 and F of chapter 411 of the Government Code. *See Gov’t Code* § 411.083(a). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI, but a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-. 127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See ORD 565.* Upon review, we find you have failed to demonstrate any portion of the remaining information consists of CHRI for purposes of chapter 411. Accordingly, the university may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

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. Section 552.101 encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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 state employees in the payroll database of the Texas Comptroller of Public Accounts. See *id.* at 348. Accordingly, the university must withhold the date of birth of the employee at issue under section 552.102(a) of the Government Code. However, upon review, we find none of the remaining information is subject to section 552.102(a) of the Government Code, and the university may not withhold any of the remaining information on that basis.

Section 552.102(b) of the Government Code excepts from disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public-school employee[.]” Gov’t Code § 552.102(b). This office has interpreted “professional public school employee” to refer to employees of public schools providing “public education” under title 2 of the Education Code, not colleges and universities providing “higher education” under title 3 of the Education Code. The employee at issue is not a professional public school employee. Accordingly, the university may not withhold the submitted transcripts under section 552.102(b).

As previously noted, section 552.101 of the Government Code encompasses common-law privacy, which is subject to the two-part test discussed above. *Indus. Found.*, 540 S.W.2d at 685. 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 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). We also note the public generally has a legitimate interest in information that relates to public employment and public employees. See Open Records Decisions 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), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance

of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

Upon review, we conclude some of the remaining information meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the university must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁵ However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the university may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees or officials of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal 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) (section 552.117 is not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We note section 552.117 does not apply to an individual's work or office telephone number. We also note section 552.117 is not applicable to a former spouse and does not protect the fact that a governmental employee has been divorced. 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). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. You provided documentation showing the employee whose information is at issue timely elected to keep confidential their home address, telephone number, social security number, emergency contact information, and whether they have family members. Accordingly, with the exception of the information we marked for release, the university must withhold the information you marked and the additional information we marked to withhold under section 552.117(a)(1) of the Government Code; however, the university may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. However, we find you have failed to demonstrate the remaining information at issue consists of home addresses and telephone numbers, social security numbers, emergency contact information, or family member information of current or former officials or employees. Therefore, the university may not withhold any of the remaining information under section 552.117 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle

⁵ As our ruling is dispositive, we need not address the remaining arguments against the information at issue.

operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the university must withhold the motor vehicle record information you marked under section 552.130 of the Government Code.

Section 552.143 of the Government Code provides, in part, the following:

(a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) is confidential and excepted from the requirements of Section 552.021.

(b) Unless the information has been publicly released, pre-investment and post-investment diligence information, including reviews and analyses, prepared for or maintained by a governmental body or a private investment fund is confidential and excepted from the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

Id. § 552.143(a), (b). Upon review, we find you have failed to demonstrate any portion of the remaining information was prepared or provided by a private investment fund or constitutes pre-investment or post-investment due diligence information. Accordingly, we find the university may not withhold any portion of the remaining information under section 552.143 of the Government Code.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Id. § 552.152. You and one of the named individuals generally raise section 552.152 of the Government Code for portions of the remaining information. Upon review, we find you and the individual at issue have failed to demonstrate the release of any portion of the remaining information would subject an employee or officer to a substantial risk of physical harm. Accordingly, the university may not withhold any of the remaining information under section 552.152 of the Government Code.

In summary, with the exception of the basic information, which must be released, the university may withhold report numbers 2018-000275, 19-0113, and 19-0214 under section 552.108(a)(1) of the Government Code and may withhold report number 20-0045 under section 552.108(a)(2) of the Government Code. The university must withhold the date of birth of the employee at issue under section 552.102(a) of the Government Code. The university must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the information we marked for release, the university must withhold the information you

marked and the additional information we marked to withhold under section 552.117(a)(1) of the Government Code; however, the university may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. The university must withhold the motor vehicle record information you marked under section 552.130 of the Government Code. The university must release the remaining 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/jm

Ref: ID# 848407

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)