



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 21, 2020

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

OR2020-26554

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# 850079.

Midwestern State University (the "university") received a request for e-mails sent to or from a named employee during a particular time period.¹ You state the university has withheld information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).² You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.115, 552.117, 552.126, 552.130, 552.142, and 552.152 of the Government Code.³ You also state release of this

¹ You state the university sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

² The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDO-E-FERPA.pdf>.

³ Although you do not raise section 552.126 of the Government Code in your brief, we understand the university to assert this exception based on your markings. Further, although you failed to timely raise sections 552.115, 552.126, 552.130, 552.142, and 552.152 of the Government Code, these provisions constitute compelling reasons to withhold information, and we will consider your argument under these exceptions. *See* Gov't Code § 552.301, .302.

information may implicate the privacy interests of individuals. Accordingly, you state you have notified the individuals of the request and of their opportunity to submit comments to this office as to why his or her information should not be released to the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from three notified individuals.⁴ We have also received and considered comments submitted by the requestor. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note section 552.301(e)(1)(D) of the Government Code states a governmental body asking for an attorney general decision must, within fifteen business days of receiving a request, provide the attorney general with “a copy of the specific information requested, *or submit representative samples of information if a voluminous amount of information was requested.*” *Id.* § 552.301(e)(1)(D) (emphasis added). We note you have submitted a voluminous amount of information consisting of over two-thousand pages of e-mail communications rather than a representative sample. We have identified and reviewed a representative sample of the voluminous information submitted.⁵

Next, a notified individual argues some of the information at issue is protected by FERPA. As noted above, the United States Department of Education Family Policy Compliance Office has informed this office that FERPA does not permit a state educational agency or institution 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.⁶ *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the university. Likewise, we do not address the individual's argument under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA).

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, including section 51.971 of the Education Code. One of the notified individuals asserts the submitted information is confidential under section 51.971(c)(1) of the Education Code, which provides, in relevant part:

⁴ As of the date of this letter, we have not received comments from any additional individuals explaining why any portion of the submitted information should not be released to the requestor

⁵ To the extent the university identifies confidential information subject to a provision not addressed in this ruling, the university should contact the Open Government Hotline.

⁶ A copy of this letter may be found on the Office of the Attorney General's website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

(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

(D) auditing.

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

...

(c) The following are confidential:

(1) Information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and

(2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.

(d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

Educ. Code § 51.971(a), (c)-(d). One of the notified individuals argues some of the submitted 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 submitted 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 of the submitted information under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code.

Section 552.101 of the Government Code also encompasses information protected by other statutes, such as section 411.083 of the Government Code, which pertains to criminal history record information (“CHRI”). CHRI generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990); *see generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F, or subchapter E-1, of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411. You generally assert section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code for the submitted information. Upon review, we find you have failed to demonstrate any of the submitted information consists of confidential CHRI. Therefore, the university may not withhold any portion of the submitted information under section 552.101 of the Government Code on this basis.

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. A compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual’s criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. 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 also has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (employee’s designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989)

(common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.).

Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, we note some of the information at issue pertains to an individual who is de-identified under section 552.117 of the Government Code, and whose privacy interest are thus protected. Accordingly, the university must withhold the information we have marked that pertains to identifiable individuals under section 552.101 of the Government Code in conjunction with common-law privacy.⁷ However, the university has failed to demonstrate the remaining information at issue is highly intimate or embarrassing to an identifiable public citizen and of no legitimate public interest. Thus, the university may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

We understand two of the notified individuals to argue some of the remaining information is confidential pursuant to common-law privacy and “special circumstances.” Section 552.101 of the Government Code also encompasses the common-law physical safety exception. For many years, this office determined section 552.101, in conjunction with the common-law right to privacy, protected information from disclosure when “special circumstances” exist in which the disclosure of information would place an individual in imminent danger of physical harm. *See, e.g.,* Open Records Decision Nos. 169 (1977) (special circumstances required to protect information must be more than mere desire for privacy or generalized fear of harassment or retribution), 123 (1976) (information protected by common-law right of privacy if disclosure presents tangible physical danger). However, the Texas Supreme Court has held freedom from physical harm does not fall under the common-law right to privacy. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112 (Tex. 2011). Instead, in *Cox*, the court recognized, for the first time, a separate common-law physical safety exception to required disclosure that exists independent of the common-law right to privacy. *Id.* at 118. Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119. Upon review, we find the notified individuals have not demonstrated the applicability of the common-law physical safety exception to the remaining information, and the university may not withhold any of the remaining information under section 552.101 on that basis.

⁷ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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 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). Upon review, we find the university must withhold the employee’s date of birth we have marked under section 552.102(a) of the Government Code. However, we find no portion 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 552.115 excepts from disclosure “[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]” Gov’t Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration officials. *See* Open Records Decision No. 338 (1982) (finding that statutory predecessor to section 552.115 excepted only those birth and death records which are maintained by the bureau of vital statistics and local registration officials). Because section 552.115 of the Government Code does not apply to information held by the university, the university may not withhold any of the remaining information on that basis.

Section 552.117(a)(1) of the Government Code 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). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). 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. We understand one of the employees whose information is at issue timely elected confidentiality under section 552.024 of the Government Code. Therefore, the university must withhold this employee’s information, which we have marked, under section 552.117(a)(1) of the Government Code; however, the university may only withhold any marked cellular telephone number if the cellular telephone service is not paid for by a governmental body.⁸ We are unable to determine if the remaining employees elected confidentiality. Therefore, to the extent the remaining employees at issue timely requested confidentiality under section 552.024 of the

⁸ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Government Code, the university must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the university may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body.⁹ Conversely, to the extent the employees at issue did not timely request confidentiality under section 552.024, the university may not withhold the information under section 552.117(a)(1). However, we find the university and a notified individual have failed to establish section 552.117(a)(1) is applicable to any of the remaining information, and the university may not withhold any of the remaining information under section 552.117(a)(1).

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.¹⁰ *See* Gov't Code § 552.1175. Section 552.1175 applies, in part, to “federal judges and state judges as defined by section 1.005, Election Code[.]” *Id.* § 552.1175(a)(13); *see also* Elec. Code § 1.005 (“State judge” means a judge of a constitutional county court). Section 552.1175 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* ORD 506 at 5-6. Accordingly, to the extent the cellular telephone number we have marked belongs to an individual who is subject to section 552.1175(a) and who elects to restrict access to the information in accordance with section 552.1175(b), the university must withhold this information under section 552.1175 of the Government Code if a governmental body does not pay for the cellular service. Conversely, if the individual whose information is at issue is not an individual who is subject to section 552.1175(a) or does not elect to restrict access to his or her information in accordance with section 552.1175(b), this information may not be withheld under section 552.1175.

Section 552.126 of the Government Code excepts from disclosure the “name of an applicant for the position of superintendent of a public school district . . . except that the board of trustees must give public notice of the name or names of the finalists being considered for the position at least 21 days” before a vote or final action is taken. *Id.* § 552.126. Furthermore, this protection from disclosure extends not only to the name of the individual, but also to any information tending to identify the individual. *See* Open Records Decision No. 540 (1990) (interpreting section 552.123—which, in language similar to section 552.126, protects identities of applicants for chief executive officer of institution of higher education—as applying to identities, rather than just names of applicants). This office has previously held the type of information that identifies individuals in such cases includes, but is not limited to, resumes, professional qualifications, membership in professional organizations, dates of birth, current positions, publications, letters of recommendation, or any other information that can be uniquely associated with a particular applicant. *Id.* at 4.

⁹ In this instance, as our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

¹⁰ The 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).

We understand you seek to withhold a portion of the remaining information under section 552.126 of the Government Code. However, we find you have failed to demonstrate the applicability of section 552.126 to the information at issue. Therefore, the university may not withhold any portion of the remaining information under section 552.126 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle 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. Upon review, we find you have failed to demonstrate any of the remaining information is subject to section 552.130. Thus, the university may not withhold any of the remaining information under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the university must withhold the account numbers we have marked under section 552.136 of the Government Code.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We are unable to determine whether the personal e-mail addresses within the remaining information at issue, some of which are located within e-mails communicating official business of the university, belong to university officials or employees. Thus, we rule conditionally. To the extent the e-mail addresses within the remaining information are the personal e-mail addresses of university officials or employees communicating official business of the university, or to the extent subsection (c) applies, this information is not subject to section 552.137 and may not be withheld on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov't Code § 552.137(a)). However, to the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of university officials or employees communicating official business of the university and subsection (c) does not apply, this information is subject to section 552.137 and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release.

Section 552.142 of the Government Code is applicable to records of certain deferred adjudications. Section 552.142 provides as follows:

(a) Information is excepted from [required public disclosure] if an order of nondisclosure of criminal history record information with respect to the information has been issued under Subchapter E-1, Chapter 411 [of the Government Code].

(b) A person who is the subject of information that is excepted from [required public disclosure] under this section may deny the occurrence of the criminal proceeding to which the information relates and the exception of the information under this section, unless the information is being used against the person in a subsequent criminal proceeding.

Gov't Code § 552.142. Although you assert some of the information may be excepted from public disclosure pursuant to section 552.142, you have not explained or provided any documentation showing an order of nondisclosure was issued prohibiting the release of the information at issue. Thus, we find you have failed to demonstrate the applicability of section 552.142 to the remaining information, and the university may not withhold it on that basis.

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 generally raise section 552.152 of the Government Code. Upon review, we find you have failed to demonstrate the release 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, the university must withhold the information we have marked that pertains to identifiable individuals under section 552.101 of the Government Code in conjunction with common-law privacy. The university must withhold the employee's date of birth we have marked under section 552.102(a) of the Government Code. The university must withhold the information we have marked pertaining to the employee who elected confidentiality under section 552.117(a)(1); however, the university may only withhold any marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. If the remaining employees at issue timely requested confidentiality under section 552.024 of the Government Code, the university must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the university may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. If the cellular telephone number we have marked belongs to an individual who is subject to section 552.1175(a) of the Government Code and who elects to restrict access to the information in accordance with section 552.1175(b), the university must withhold this information under section 552.1175 of the Government Code if a governmental body does not pay for the cellular service. The university must withhold

the account numbers we have marked under section 552.136 of the Government Code. To the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of university officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release. The university must release the remaining information.¹¹

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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/gw

Ref: ID# 850079

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)

¹¹ Section 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 under the Act. *See* Gov't Code § 552.147(b).