



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 29, 1995

Mr. James R. Raup  
McGinnis, Lochridge & Kilgore  
1300 Capitol Center  
919 Congress Avenue  
Austin, Texas 78701

OR95-1630

Dear Mr. Raup:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27799.

Austin Community College ("ACC") has received two requests for information relating to a certain instructor. One of the requestors seeks "[a]ll personnel records of Ms. Cynthia Young, who taught the Monday through Thursday upholstery class at the Rio Grande Campus," including personnel evaluations and disciplinary records; complaints filed against Ms. Young and records reflecting the resolution of those complaints; records documenting Ms. Young's attendance for the past five years; salary information; and records reflecting Ms. Young's current employment status with the college. The other requestor seeks "[a]ll records related to the reinstatement of Cindy Young as an ACC upholstery instructor." You advise us that ACC has made some of the requested information available to the requestors. You object, however, to release of some of the requested information, which you have submitted to us for review, and claim that section 552.101 of the Government Code exempts it from required public disclosure.

Section 552.101 of the Government Code exempts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." First, we address your claim that the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2654 in conjunction with section 825.500(e) of title 29 of the Code of Federal Regulations makes the submitted information confidential. Section 825.500 is promulgated pursuant to authority contained in the FMLA. *See* 29 U.S.C. § 2654. Section 825.500(e) provides as follows:

Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, shall be maintained in separate files/records and be treated as confidential medical records.

29 C.F.R. § 825.500(e).<sup>1</sup> Under the FMLA, an employer may require a medical certification from a health care provider to support FMLA leave requests either to care for an employee's seriously ill family member or for leave due to a serious health condition that makes the employee unable to perform the functions of the employee's job. *Id.* § 825.305. Recertification may also be required. *Id.*

Much of the information submitted to us for review does not relate to Ms. Young's request for leave under the FMLA. Rather, some of the information relates to ACC's response to student complaints lodged against Ms. Young, and some of it merely reveals the fact that Ms. Young has requested either departmental leave or leave under the FMLA. We conclude that section 825.500(e) of title 29 of the Code of Federal Regulations does not make such information confidential. Some of the submitted information, however, clearly falls within the protection of section 825.500(e), namely, information relating to Ms. Young's request for leave under the FMLA, including documents entitled "Family and Medical Leave Request Form," "Certification of Physician or Practitioner/Family and Medical Leave Act of 1993," and "Family and Medical Leave Certification Form." These documents, which we have marked, are clearly "records and documents relating to medical certifications, recertifications or medical histories" and must therefore be withheld from required public disclosure under section 552.101 of the Government Code.

Finally, we conclude that common-law privacy protects some of the submitted information from required public disclosure. Information must be withheld under common-law privacy if it meets the criteria the Texas Supreme Court articulated for section 552.101 in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, a governmental body must withhold information on common-law privacy grounds only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. While common-law privacy may protect an individual's medical history, *see, e.g.*, Open Records Decision Nos. 539 (1990), 455 (1987), 422 (1984), it does not protect

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<sup>1</sup>An "employer" under the FMLA includes any "public agency," as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. § 203(x). *Id.* § 825.108(a). Section 3(x) of the Fair Labor Standards Act defines "public agency" to include an agency of the United States, a state, or a political subdivision of a state, or any interstate governmental agency. *See* 29 U.S.C. § 203(x); *see also* 29 C.F.R. § 825.108. The college is a "public agency" for purposes of the Fair Labor Standards Act and an "employer" for purposes of the FMLA.

all medically related information, *see* Open Records Decision No. 478 (1987). Individual determinations are required.<sup>2</sup> Open Records Decision No. 370 (1983). We have marked the information that ACC must withhold under common-law privacy.<sup>3</sup>

The submitted information includes social security numbers that may be excepted from disclosure under section 552.101 of the Government Code. A social security number may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii) if it was obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994).

In addition, we note that section 552.117 of the Government Code may apply to portions of the submitted information. Section 552.117 requires you to withhold any home address or telephone number of an official or employee who requested that this information be kept confidential under section 552.024.<sup>4</sup> You may not, however, withhold the home address or telephone number of an official or employee who made the request for confidentiality under section 552.024 after this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

In summary, you must withhold the information we have marked under the FMLA and common-law privacy. The remaining information, except as noted above, must be released.

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<sup>2</sup>This office has determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81 (1983); and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress, Open Records Decision No. 343 (1982).

<sup>3</sup>Because we conclude that you must withhold medical information on the basis of common-law privacy and the FMLA, we do not address your assertion that section 12112(d)(4)(C) of title 42 of the United States Code makes the submitted medical information confidential.

<sup>4</sup>Sections 552.024 and 552.117 of the Government Code were amended by the Seventy-Fourth Legislature to include social security numbers and information revealing whether a government employee has family members. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, §§ 5, 9, 1995 Sess. Law Serv. 5127, 5130, 5132. The amendments to chapter 552 "affecting the availability of information, the inspection of information, or the copying of information, including the costs for copying information, apply only to a request for information that is received by a governmental body on or after September 1, 1995." *Id.* § 26(a), 1995 Tex. Sess. Law Serv. at 5142 (Vernon). A request for information that is received by a governmental body prior to September 1, 1995, is governed by the law in effect at the time the request is made. *Id.*

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Records Division

LRD/GCK/rho

Ref.: ID# 27799

Enclosures: Marked documents

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