



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 28, 1996

Ms. Penny Puryear Burt
General Counsel
Board of Nurse Examiners for the State of Texas
9101 Burnet Road, Suite 104
Austin, Texas 78758

OR96-807

Dear Ms. Burt:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29566.

The Board of Nurse Examiners for the State of Texas (the "board") has received a request for the performance and personnel files of five agency employees. You have submitted copies of the requested documents and submit that the information in the files is excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.111, and 552.117 of the Government Code.¹

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of *Texas Department of Public Safety v. Gilbreath*, 842 W.2d 408 (Tex. App.--Austin 1992, no writ), and concluded that it excepts only those internal

¹We note that the open records laws were substantially amended by the Seventy-fourth Legislature. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127 (Vernon) (to be codified as amendments to Gov't Code ch. 552). 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.*

communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. The requested information relates to routine personnel matters; section 552.111 does not except it from required public disclosure. Therefore, you may not withhold the information under section 552.111.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In order for information to be protected from public disclosure under the common-law right of privacy as incorporated by section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. art. 6252-17a, § 3(a)(1)). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.102 excepts in pertinent part:

(a) . . . information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

Section 552.102(a) protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin

1983, writ ref'd n.r.e.) (ruling that test to be applied in decision under statutory predecessor to § 552.102 was same as that delineated in *Industrial Foundation* for statutory predecessor to § 552.101). Accordingly, we will consider the arguments for withholding information from required public disclosure under section 552.101 and section 552.102(a) together.

The scope of public employee privacy is very narrow. See Attorney General Opinion JM-229 (1984); Open Records Decision Nos. 423 (1984), 421 (1984), 400 (1983), 336 (1982). Although information relating to an investigation of a public employee may be embarrassing, the public generally has a legitimate interest in knowing about the job performance of public employees. See Open Records Decision Nos. 444 (1986), 405 (1983), 400 (1983). Similarly, information regarding a public employee's dismissal, demotion, promotion, or resignation is not excepted from public disclosure. See Open Records Decision No. 444 (1986) at 4; see also Open Records Decision No. 230 (1979) (concluding that predecessor to § 552.102 does not except from public disclosure investigative report regarding allegations of misuse of school district employees and materials).

You have not marked the documents to show which exceptions apply to which portions of the submitted documents. We have inspected the documents and have determined that portions of them are protected by common-law privacy. Information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. For example, lists of mandatory Employee Retirement System contributions, information indicating whether an employee has declined all state funded insurance coverage, and beneficiaries of state funded life insurance coverage are subject to disclosure under the Open Records Act. However, certain information is protected from disclosure as it relates to employees' personal financial decisions to allocate portions of their compensation to optional benefits, and it involves no state funding. Optional benefits reflected in the records at issue include participation in TexFlex (an employee benefit plan that allows an employee to choose between cash compensation and one or more tax-exempt fringe benefits); participation in deferred compensation plans; and purchase of optional life, accident, dependent life or disability insurance. Open Records Decision No. 600 (1992). While basic information about enrollment in a state funded insurance plan is public, information about the particular insurance carriers selected and notification of changes in primary physician by employees is not. Additionally, information relating to employee dependents and beneficiaries of optional insurance coverage is excepted from disclosure by a common-law right of privacy. *Id.* at 10. You must withhold these types of information.

The documents at issue include a request for employment verification from a financial institution and certain information regarding the medical condition of employees. This information is excepted from disclosure under common-law privacy. Open Records Decision Nos. 545 (1990) (concluding that disclosure of personal financial information about individual ordinarily is of no legitimate concern to public), 343 (1982)

(concluding that certain medical information, not excepted by Medical Practice Act, V.T.C.S. art. 4495b, may be withheld under constitutional or common-law right of privacy: e.g., information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). You must withhold these types of information.

Some of the information is confidential by statute. The submitted documents contain copies of Employee's Withholding Allowance Certificates, Form W-4 of the Internal Revenue Service, which have been completed by employees. These are excepted from disclosure by title 26, section 6103(a), of the United States Code. Open Records Decision No. 600 (1992) at 8-9. Therefore, you must withhold this information.

Submitted documents include copies of physician's notes and records of on-the-job injuries. Medical records created by or under the supervision of a physician or maintained by a physician are excepted from disclosure under section 5.08(b) of article 4495b, V.T.C.S., the Medical Practice Act. Open Records Decision No. 324 (1982). Copies of physicians' notes and notes prepared by nurses acting under a physician's supervision are excepted by this provision. These records may be released only in accordance with the Medical Practice Act.

We have marked those portions of the documents that must be withheld under section 552.101.² Except as noted above, you may not withhold information under sections 552.101 and 552.102.

You claim that certain information must be withheld pursuant to section 552.117. You must withhold the home addresses and telephone numbers of all current or former officials or employees of the board who have requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). Whether a particular piece of information is nondisclosable under section

²We note that the information submitted contains social security numbers. A social security number or "related record" 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), in certain cases. In relevant part, the 1990 amendments to the federal Social Security Act or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990 make confidential social security numbers and related records that are obtained and maintained by a state agency. See Open Records Decision No. 622 (1994). We caution, however, that an employer may be required to obtain an employee's social security number under laws that predate October 1, 1990; a social security number obtained under a law that predates October 1, 1990, is not made confidential by the 1990 amendments to the Social Security Act. Based on the information that you have provided, we are unable to determine whether the social security numbers contained in the submitted documents are confidential under federal law. On the other hand, section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing *any* social security number, you should ensure that it was not obtained pursuant to a law enacted on or after October 1, 1990. We note, however, that hiring an individual after October 1, 1990, is not the same as obtaining an individual's social security number pursuant to a law enacted on or after October 1, 1990.

552.117 must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5. Therefore, you may not 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. The submitted files contain no notice pursuant to section 552.024 that the employees wish their home addresses and telephone numbers withheld. If notice was not provided prior to this open records request, the information must be released.³

We note that in one file you have redacted information concerning the names and addresses provided by an employee as emergency contacts. We assume that you are claiming that the information is excepted from required public disclosure pursuant to section 552.101, 552.102, or 552.117. In the document at issue, for example, one contact is a family member who appears to have the same home address and telephone number as the employee. In this case, should the employee have provided notification pursuant to section 552.024, you may withhold this portion of the information pursuant to section 552.117. However, the name of the family member contact and the name, telephone numbers, and address of the other contact person are not protected under section 552.117 and must be released. Disclosure of a person's name, home address, and telephone number is not an invasion of privacy. Open Records Decision No. 554 (1990). Disclosure of such information may be prevented only by demonstrating the special circumstances outlined in Open Records Decision No. 169 (1977) (copy enclosed). *See also* Open Records Decision No. 264 (1981). The board has not raised any special circumstances that would apply to this information. Therefore, it must be released.

In summary, except as noted above, the documents must be released. 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 under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Open Records Division

³An accident report you have submitted lists the name, address, and telephone number of a witness. The witness appears to be an employee. If the witness is an employee of the board, the address and telephone number may be released only as provided in sections 552.024 and 552.117. Otherwise, this information must be released.

KHG/LRD/rho

Ref.: ID# 29566

Enclosures: Open Records Decision No. 169 (1977)
Marked documents