



March 15, 2001

Ms. Cheryl T. Mehl
Schwartz & Eichelbaum, P.C.
4201 West Parmer Lane, Suite 100
Austin, Texas 78727

OR2001-1019

Dear Ms. Mehl:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144982.

The Eanes Independent School District (the "district"), which you represent, received a request for three categories of information related to a former district employee. You inform us that the district has made a large amount of responsive information available to the requestor, but assert that a particular responsive document is excepted from disclosure under section 552.101 of the Government Code in conjunction with the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (the "ADA"), as well as under common law privacy. We have considered the exception you claim and reviewed the submitted information.

We note at the outset that your office "inadvertently" sent a copy of its original request letter with attachments to the requestor. In Open Records Decision No. 376 (1973), this office addressed a governmental body's ability to raise exceptions to disclosure for information that had previously been released to the public in an unauthorized manner and concluded that:

[a]lthough this office has held that a governmental body that *voluntarily* furnishes information to a newspaper may not later claim that that information may be withheld from others, Open Records Decision No. 162 (1977), it has never held that information which is *not* voluntarily released by a governmental body, but which nevertheless finds its way into the hands of a member of the general public, is henceforth automatically available to everyone. In our opinion, the Open Records Act does not preclude a

governmental body from invoking one or more of the act's exceptions to protect from further public disclosure information which has been released on a limited basis through no official action, and against the wishes and policy of, the governmental body.

Open Records Decision No. 376 at 2 (1983) (emphasis in original). You inform this office that the requestor, who received the documents in error, returned them to your offices. We therefore conclude that the prior unauthorized release of the document you seek to withhold does not affect the district's ability to invoke the protection of section 552.101 for those documents now. We will therefore consider your section 552.101 claim for the submitted document.

Section 552.101 encompasses confidentiality provisions such as the Family and Medical Leave Act, 29 U.S.C. § 2654 (the "FMLA"). Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review of the submitted information, we conclude that this document is confidential under the FMLA as a medical certification, and therefore it must be withheld from the requestor under section 552.101 of the Government Code. As we resolve your request under the FMLA, we need not address your arguments under the ADA or common law privacy.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Pearle".

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 144982

Encl. Submitted documents .

cc: Mr. Danny Robbins
Houston Chronicle
P.O. Box 4260
Houston, Texas 77210
(w/o enclosures)