



June 11, 2002

Mr. James L. Hall  
Assistant General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342

OR2002-3138

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164203.

The Texas Department of Criminal Justice (the "department") received a request for certified copies of a department employee's employment records. You claim that portions of the submitted information are excepted from disclosure pursuant to sections 552.101, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that some of the information constitutes medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have marked the medical records that may only be disclosed in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991), 546 (1990) (finding that because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, the department must withhold these medical records from disclosure pursuant to the MPA.

Next, we note that some of the information is subject to section 552.134(a) of the Government Code. Section 552.134 states in pertinent part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code, § 552.134(a). Portions of the information, which we have marked, concern inmates who are confined in a facility operated by the department. Section 552.029 of the Government Code does not apply to these marked portions. Accordingly, the department must withhold the information that we have marked from disclosure pursuant to section 552.134 of the Government Code.

We also note that the information contains driver's license numbers, which we have marked, that may be subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Therefore, if the marked numbers are Texas driver's license numbers, we conclude that the department must withhold those numbers from disclosure pursuant to section 552.130 of the Government Code. Otherwise, we conclude that the department must release those numbers to the requestor.

You claim that portions of the submitted information are excepted from disclosure pursuant to section 552.117(3) of the Government Code. Section 552.117(3) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of an employee of the department, regardless of whether the employee complies with section 552.1175 of the Government Code. *See* Gov't Code § 552.117(3). We note, however, that section 552.117(3) is inapplicable to an individual who is not employed by the department at the time that the department receives a request for information. In this instance, the former employee was not an employee of the department at the time that it received the present request. Accordingly, we conclude that no portion of the information is excepted from disclosure pursuant to section 552.117(3) of the Government Code.

However, you also claim that portions of the information are excepted from disclosure pursuant to section 552.117(1) of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality

under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989).

You have submitted a form to our office that was completed by the employee prior to the department's receipt of the present request and that, you contend, complies with the election requirements of section 552.024. However, we note that section 552.024 provides in pertinent part that each employee of a governmental body shall choose whether to allow public access to section 552.117 information about that employee. *See* Gov't Code § 552.024(a). We do not agree that the form demonstrates that the employee at issue requested confidentiality. In fact, the form states that "[y]ou are required to furnish the following information under current TDCJ-ID Rules and Regulations." Thus, we find that the form does not demonstrate that the former employee made a proper section 552.024 election prior to the department's receipt of the present request. However, to the extent that the former employee otherwise made a proper section 552.024 election prior to the department's receipt of the present request, we conclude that the department must withhold from disclosure the information that we have marked pursuant to section 552.117(1). Otherwise, the information that we have so marked is not excepted from disclosure under section 552.117(1) of the Government Code, in which case, we next address your claim regarding section 552.1175.

Section 552.1175 provides in pertinent part:

(a) This section applies only to:

...

(3) employees of the Texas Department of Criminal Justice;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). We understand you to contend that the same form that was discussed above constitutes a "form provided by" the department for purposes of section 552.1175(b)(2). As noted above, however, the form does not reflect that the employee at issue chose confidentiality. Therefore, we find that this form does not reflect that the employee made a proper section 552.1175 election. However, to the extent that the employee otherwise made a proper section 552.1175 election at a time when he was an employee of the department, we conclude that the department must withhold from disclosure the information that we have marked pursuant to section 552.1175. Otherwise, we conclude that the department may not withhold any portion of that marked information pursuant to section 552.1175 of the Government Code.

We note, however, that the former employee's social security number and card, as well as the social security numbers and cards of other department employees, which we have marked, may nevertheless be confidential under federal law. A social security number or "related record" may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I).<sup>1</sup> See Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or 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 *id.* You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the department to obtain or maintain social security numbers or cards. Therefore, we have no basis for concluding that these social security numbers or cards are confidential under section 405(c)(2)(C)(viii)(I). We caution the department, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers and cards, the department should ensure that they were not obtained and are not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

You also claim that some of the information is excepted from disclosure pursuant to section 552.101 in conjunction with section 6103(a) of Title 26 of the United States Code. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. See 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); see also Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, we conclude that the department must withhold the W-4 forms that we have marked from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

You also claim that portions of the information are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also

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<sup>1</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

encompasses the common-law right to privacy. Information is protected by the common-law right of privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 611 at 1 (1992). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. *See* Open Records Decision Nos. 600 (1992) (finding designation of beneficiary of employee's retirement benefits, direct deposit authorization, TexFlex benefits, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care related to personal financial decisions). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992). Based on our review of the information, we conclude that the department must withhold from disclosure the information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy.

In summary, absent the applicability of an MPA access provision, the department must withhold the marked medical records from disclosure pursuant to the MPA. The department must withhold the information that we have marked from disclosure pursuant to section 552.134 of the Government Code. If the marked driver's license numbers are Texas driver's license numbers, we conclude that the department must withhold those numbers from disclosure pursuant to section 552.130 of the Government Code. To the extent that the former employee made a proper section 552.024 election prior to the department's receipt of the present request, we conclude that the department must withhold from disclosure the information that we have marked pursuant to section 552.117(1) of the Government Code. To the extent that the former employee made a proper section 552.1175 election at a time when he was an employee of the department, we conclude that the department must withhold from disclosure the information that we have marked pursuant to section 552.1175 of the Government Code. The former employee's social security number and card, as well as the social security numbers and cards of other department employees, which we have marked, may be confidential under federal law. The department must withhold the W-4 forms that we have marked from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The department must withhold from disclosure the information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy. The department must release all remaining information to the requestor.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. 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,



W. Montgomery Meitler  
Assistant Attorney General  
Open Records Division

WMM/RJB/seg

Ref: ID# 164203

Enc. Marked documents

cc: Ms. Lili P. Lemieux  
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