



October 28, 2002

Ms. Genevieve G. Stubbs  
Senior Associate General Counsel  
The Texas A&M University System  
301 Tarrow, 6th Floor  
College Station, Texas 77840-7896

OR2002-6069

Dear Ms. Stubbs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170599.

The Baylor College of Dentistry, a component of the Texas A&M University System Health Science Center, ("BCD"), received a request for 25 categories of information. You have provided this office with information indicating that BCD has released a portion of the responsive information, that BCD has requested clarification of portions of the request, *see* Government Code section 552.222(b), and that BCD does not possess another portion of the requested information.<sup>1</sup> Additionally, BCD has declined to answer factual questions the requestor asks in her request. The Public Information Act does not require a governmental body to answer fact questions. Open records Decision no. 555 (1990). However, you seek a ruling with regard to two of the requested categories: 1) information responsive to the request for the documents of a named nurse for visits to the clinic by three named individuals; and 2) documents of all work-related injuries and illnesses from 1985 through the date of the request. You argue that this information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions

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<sup>1</sup>The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

you claim and reviewed the submitted representative sample of information.<sup>2</sup> See Gov't Code § 552.304 (permitting interested party to submit reasons why requested information should or should not be released).

First, we note that, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why any stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office copies of the majority of the information responsive to the either category of information identified above, or a representative sample thereof, within the 15 business-day deadline.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). In this instance, you claim that the information at issue is confidential in accordance with various statutes and must therefore be withheld under section 552.101 of the Government Code. The application of section 552.101 presents a compelling reason to overcome the presumption of openness.<sup>3</sup> Therefore, we will address your arguments against disclosure.

First, you assert that the information at issue is made confidential under the Americans with Disabilities Act, (the "ADA"), 42 U.S.C. § 12101 *et seq.*, and is therefore excepted from disclosure under section 552.101. The ADA provides that "[a] covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an

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<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.” 42 U.S.C. 12112(d)(4)(B). Such information must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. 42 U.S.C. 12112(d)(4)(C).

In Open Records Decision No. 641 (1996), this office addressed the ADA and stated:

Title I of the ADA and the EEOC regulations adopted pursuant to specific statutory authority provide for the confidentiality of medical condition and history information collected from applicants and employees. . . . Section 12112(d)(4)(C) provides that information “regarding the medical condition or history of any employee” obtained as part of a work-site based health program also must be maintained on separate forms, in separate files, and be kept confidential. *See also* 29 C.F.R. § 1630.14(d)(1) (providing that this information “*shall* be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record”) (emphasis added). As to information obtained from employees’ job-related medical examinations or medical inquiries, the interpretive rules make clear that medical condition and medical history information so obtained is subject to the same restrictions. . . .

ORD 641 at 6 (1996). However, as this office also noted in ORD 641 with regard to confidential medical records, the ADA further provides that:

- (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (iii) government officials investigating compliance with this chapter shall be provided relevant information on request . . . .

*See* 42 U.S.C. § 12112(d)(3)(B); 29 C.F.R. § 1630.14(d)(1).

You inform us that the information you seek to withhold under the ADA “is about medical conditions and medical histories of employees and is collected by the BCD *as an employer*.” We therefore understand that the information you seek to withhold under the ADA was obtained either as part of a work-site based health program or as part of a job-related medical exam or inquiry. It does not appear that the requestor is among those categories of individuals entitled to access such information. Accordingly, we agree that this information

is made confidential under the ADA and is therefore excepted from disclosure under section 552.101 of the Government Code. As we are able to make this determination, we need not address your remaining arguments against disclosure.

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,

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

Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/jh

Ref: ID# 170599

Enc. Submitted documents

c: Ms. Rebecca S. Williams  
2204 North Beltline Road #1126  
Mesquite, Texas 75150  
(w/o enclosures)