



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

January 2, 2003

Mr. Lance Beversdorff  
Staff Attorney  
Texas Youth Commission  
P.O. Box 4260  
Austin, Texas 78765

OR2003-0039

Dear Mr. Beversdorff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174422.

The Texas Youth Commission (the "commission") received a request for (1) a named individual's medical records; (2) information relating to any disciplinary actions taken against that individual; (3) information relating to investigations of two named commission employees; and (4) the two employees' personnel files. You claim that information contained in the employees' personnel files is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We also received comments from the requestor. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released). We assume that the commission has released any other responsive information that was in existence when the commission received this request for information. If not, then the commission must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). We note that chapter 552 of the Government Code does not require the department to release information that did not exist when it received this request or to create responsive information. *See* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8

U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). In this case, the release of the submitted Form I-9's would be "for purposes other than for enforcement" of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the Form I-9's that we have marked must be withheld from disclosure under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

A W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). We have marked W-4 forms that the commission must withhold under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked information that the commission must withhold under section 552.101 of the Government Code in conjunction with the ADA.

Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential under federal and state law. Federal law governs the dissemination of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* ORD 565 at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency

to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov't Code § 411.089(b). Any CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Any CHRI obtained from the Texas Department of Public Safety (the "DPS") or another criminal justice agency must be withheld as provided by subchapter F of chapter 411 of the Government Code. Furthermore, when a law enforcement agency compiles a living individual's criminal history information, the compiled information takes on a character that implicates the individual's right to privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); Open Records Decision No. 616 at 2-3 (1993).<sup>1</sup> You claim that the submitted documents contain criminal history information. We conclude, however, that none of the submitted information is excepted from disclosure under section 552.101 in conjunction with section 20.21 of title 28 of the Code of Federal Regulations, subchapter F of chapter 411 of the Government Code, or *Reporters Committee*. *See* Gov't Code § 411.082(2)(B) ("criminal history record information" does not include driving record information).

Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in part:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We find that some of the submitted information is confidential under section 611.002. We have marked that information accordingly. Unless the requestor has a right of access to the marked information under sections 611.004 and 611.0045, it must be withheld from disclosure under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

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<sup>1</sup>Section 552.101 of the Government Code also encompasses the common-law right to privacy. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

The submitted documents also include medical records. The disclosure of medical records is governed by the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) 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.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Furthermore, section 159.002(c) requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991). We have marked the submitted information that is governed by the MPA. The commission must not release that information unless the MPA permits the commission to do so.

The submitted documents also include information that relates to workers' compensation claims. Section 402.083 of the Labor Code pertains to records of the Texas Workers' Compensation Commission (the "commission") and provides in part:

(a) Information in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this subtitle.

Labor Code § 402.083(a). This provision makes information in the commission's claim files confidential. *See* Open Records Decision No. 619 (1993). Section 402.086(a) of the Labor

Code essentially transfers this confidentiality to information that other parties obtain from the commission's files. Section 402.086 provides in part:

(a) Information relating to a claim that is confidential under this subtitle remains confidential when released to any person, except when used in court for the purposes of an appeal.

*Id.* § 402.086(a). In Open Records Decision No. 533 (1989), this office determined that the predecessor provision to sections 402.083 and 402.086 protected information received from the Industrial Accident Board (now the commission), but did not protect information regarding workers compensation claims that the governmental body did not receive from the commission. In this instance, we are unable to ascertain whether any of the submitted information was provided to the youth commission by the workers' compensation commission. Nevertheless, to the extent that any of the submitted information was provided to the youth commission by the workers' compensation commission, such information must be withheld from disclosure in their entirety under section 552.101 of the Government Code in conjunction with sections 402.083 and 402.086 of the Labor Code. To the extent, however, that the submitted information was not obtained from the workers' compensation commission, the information is not confidential under section 552.101 in conjunction with sections 402.083 and 402.086.

You also raise section 552.101 in conjunction with section 815.503 of the Government Code. Section 815.503 provides in part that:

[r]ecords of members, annuitants, beneficiaries, and alternate payees under retirement plans administered by the retirement system that are in the custody of the system or of an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this chapter.

Gov't Code § 815.503(a); *see also* § 811.001(15) (defining "retirement system" as the state employees retirement system). You claim that some of the submitted information consists of retirement information. We conclude, however, that this information is not excepted from disclosure under section 552.101 of the Government Code in conjunction with section 815.503.

Section 552.101 of the Government Code also encompasses constitutional and common-law rights of privacy. Constitutional privacy protects two kinds of interests. *See* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation,

contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See Open Records Decision No. 455 at 3-7 (1987); see also *Fadjo v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See Open Records Decision No. 455 at 6-7 (1987); see also *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). The application of this aspect of constitutional privacy requires a balancing of the individual's privacy interest against the public's interest in the information. See Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). We conclude that none of the submitted information is protected by constitutional privacy under section 552.101.

Common-law privacy under section 552.101 protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You also raise section 552.102 of the Government Code, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). The test of privacy under section 552.102(a) is the same as the common-law privacy test under section 552.101. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Therefore, we will address your common-law privacy claim under section 552.101.

Common-law privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 594 at 4-5 (1991) (results of employee drug testing), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 394 at 4-5 (1983) (identities of juvenile offenders), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We have marked the submitted information that the commission must withhold under section 552.101 in conjunction with common-law privacy.

Certain types of personal financial information also are protected by common-law privacy under section 552.101. In prior decisions, this office has determined that financial information relating only to an individual ordinarily satisfies the first element of the

common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990), 523 at 4 (1989), 373 at 4 (1983). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (TexFlex benefits), 545 at 3-5 (1990) (deferred compensation plan). Likewise, an employee's designation of a retirement beneficiary is excepted from disclosure under the common-law right to privacy. *See* Open Records Decision No. 600 at 9 (1992). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. *Id.* at 9. Likewise, information relating to a pay leveling election is a basic fact about a transaction with a governmental body and thus is not private under section 552.101. *Id.* at 10-11. We have marked the types of personal financial information that the commission must withhold under section 552.101 of the Government Code in conjunction with common-law privacy, provided that the information does not relate to a transaction that is funded in part by the commission.

You also raise section 552.117 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. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the commission may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the employee timely elected to keep his or her personal information confidential, then the commission must withhold the employee's home addresses and telephone numbers, social security number, and any information that reveals whether the employee has family members. The commission may not withhold this information under section 552.117 on behalf of an employee who did not make a timely election under section 552.024 to keep the information confidential. You indicate that the submitted records relate to employees who timely elected to keep their personal information confidential. Accordingly, we have marked the types of information that the commission must withhold under section 552.117.

Section 552.130 of the Government Code 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[.]" Gov't Code § 552.130(a)(1). We have marked Texas driver's license information that must be withheld from disclosure under section 552.130.

In summary, the commission must withhold portions of the submitted information under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; section 6103 of title 26 of the United States Code; the Americans with

Disabilities Act; section 611.002 of the Health and Safety Code; and common-law privacy. The submitted medical records are governed by the MPA and must not be released unless the MPA permits the commission to do so. Information relating to workers' compensation claims may be excepted from disclosure under section 552.101 in conjunction with sections 402.083 and 402.086 if the information was obtained from the Texas Workers' Compensation Commission. The home addresses and telephone numbers, social security numbers, and family member information of the employees in question must be withheld under section 552.117. Texas driver's license information must be withheld under section 552.130. The rest of the submitted information must be released.

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,



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Open Records Division

JEB/JWM/sdk

Ref: ID# 174422

Enc: Marked documents

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