



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 3, 2003

Mr. G. Chadwick Weaver
First Assistant City Attorney
Office of the City Attorney
City of Midland
P. O. Box 1152
Midland, Texas 79702-1152

OR2003-0701

Dear Mr. Weaver:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175854.

The City of Midland (the "city") received a request for information pertaining to a specified city fire department employee. You state that you have provided the requestor with some responsive information. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the information at issue contains a medical record that is 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). Medical records must be released upon the governmental body's receipt of 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. Section 159.002(c) also 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). Accordingly, we conclude that the information that we have marked may only be disclosed in accordance with the access provisions of the MPA. Absent the applicability of an MPA access provision, we conclude that the city must withhold the marked medical record from disclosure pursuant to the MPA.

Exhibit C consists of W-4 form information that is subject to section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code.¹ Section 6103(a) 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 city must withhold Exhibit C pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

You claim that portions of the information at issue are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses information that is protected from disclosure pursuant to the common-law right to privacy. Information is protected from disclosure under 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 that 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, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care related to personal financial decisions), 545 (1990) (finding information relating to deferred compensation plan, an individual's mortgage payments, assets, bills, and credit history excepted from disclosure under common-law privacy), 523 (1989). 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

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

our review of your representations and the information at issue, we conclude that the city must withhold the personal financial information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also claim that portions of the information at issue are excepted from disclosure pursuant to 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 timely 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 for this information 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)*.

The submitted information reflects that the employee who is the subject of this request requested confidentiality with regard to his home address and home telephone number prior to the city's receipt of the request. Accordingly, we conclude that the city must withhold this information pursuant to section 552.117(1). Furthermore, we conclude that the city must withhold the employee's family member information and social security number pursuant to section 552.117(1), but only if the subject employee otherwise timely elected under section 552.024 to keep this information confidential prior to the city's receipt of the request. We have marked a representative sample of this type of information for your review.

Nevertheless, we note that the social security number of the subject employee in the information at issue and in Exhibit E may be confidential under federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), 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 Open Records Decision No. 622 (1994)*. The city has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain this social security number. Therefore, we have no basis for concluding that it is confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security number at issue, the city should ensure that it was not obtained and is not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Finally, you claim that portions of the information at issue are excepted from disclosure pursuant 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. Accordingly, we conclude that the city must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code. We have marked a representative sample of this type of information for your review.

In summary, absent the applicability of an MPA access provision, the city must withhold the marked medical record pursuant to the MPA. The city must withhold Exhibit C pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The city must withhold the personal financial information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy. The city must withhold the subject employee's home addresses and home telephone numbers pursuant to section 552.117(1) of the Government Code. The city must also withhold the subject employee's family member information and social security number pursuant to section 552.117(1), but only if he otherwise timely elected under section 552.024 to keep this information confidential prior to the city's receipt of the request. Nevertheless, this employee's social security number may be confidential under federal law. The city must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code. The city must release to the requestor the remaining submitted information that has not already been provided.

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

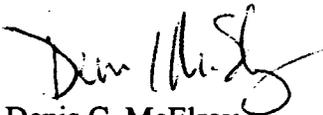
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/RJB/lmt

Ref: ID# 175854

Enc. Marked documents

c: Ms. Debi Goodman
2401 Wydeewood Drive
Midland, Texas 79707
(w/o enclosures)