



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 9, 2003

Ms. Joanne Wright  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2003-6342

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187375.

The Texas Department of Transportation (the "department") received a request for information relating to a named department employee. In particular, the requestor asks for (1) the diary of a named department supervisor for the period from January 20, 2003 through the present, (2) a grader maintenance report of February 4, 2003, showing the named employee's participation, (3) incident reports relating to the named employee, and (4) "any and all [department] records that relate to [the named employee]." You state that the department will withhold Texas driver's license numbers pursuant to a previous determination of this office issued to the department in Open Records Letter No. 2002-0465 (2002). See Gov't Code § 552.301(a), (f) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). We note that the sample records you have submitted do not include any information responsive to the requests for the supervisor's diary and the grader maintenance report, nor have you raised any exceptions to disclosure for this information. Therefore, we assume that, to the extent this information exists, it has been released to the requestor. If not, you must release it immediately. See Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances). You claim that portions of the submitted information are excepted from disclosure under

sections 552.101, 552.107, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

First, you contend that the information submitted as Exhibit B is protected by the attorney-client privilege. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922

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<sup>1</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.

S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the documents in Exhibit B consist of confidential communications of legal advice between a department attorney and department staff. Based on your representations and our review of the information, we agree that the information in Exhibit B is protected by the attorney-client privilege. Accordingly, the department may withhold Exhibit B pursuant to section 552.107 of the Government Code.<sup>2</sup>

We next address the personnel records submitted as Exhibit C. 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 section encompasses information protected by other statutes, including the Family and Medical Leave Act, section 2654 of title 29 of the United States Code (the “FMLA”). Section 825.500 of title 29 of the Code of Federal Regulations provides 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). Based on your representations and our review of the information at issue, we understand you to assert that a portion of the information in Exhibit C, which you have marked, is maintained as information related to medical certifications, recertifications or medical histories, created for purposes of the FMLA. We find that none

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<sup>2</sup>Based on this finding, we do not reach your claim under section 552.111 of the Government Code regarding Exhibit B.

of the release provisions of the FMLA apply to this information. Thus, we agree that the information you have marked to withhold under the FMLA in Exhibit C is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the FMLA.

Next, we note that the remaining documents in Exhibit C contain medical records that are not included in the portion of Exhibit C that is excepted from disclosure under section 552.101 of the Government Code in conjunction with the FMLA. Access to medical records is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(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.

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. 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. Open Records Decision No. 565 at 7 (1990). We have marked medical records in the remaining documents in Exhibit C that may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

The remaining documents in Exhibit C also include records relating to chiropractic services that are not included in the portion of Exhibit C that is excepted from disclosure under section 552.101 of the Government Code in conjunction with the FMLA. Chapter 201 of the Occupations Code governs the practice of chiropractic. Section 201.402 of the Occupations Code provides in pertinent part:

(a) Communications between a chiropractor and a patient relating to or in connection with any professional services provided by a chiropractor to the patient are confidential and privileged and may not be disclosed except as provided by this subchapter.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are

confidential and privileged and may not be disclosed except as provided by this subchapter.

(c) A person who receives information from the confidential communications or records, excluding a person listed in Section 201.404(a) 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.

Chapter 201 includes exceptions to confidentiality and consent provisions that correspond to those contained in the MPA. *See id.* §§ 201.403, .404, .405. We have marked the documents that are subject to chapter 201 of the Occupations Code. The department may release these records only as provided under chapter 201 of the Occupations Code.

The records in Exhibit C include the employee's W-2, W-4, and W-5 forms. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). We determine that the submitted W-2, W-4, and W-5 forms are tax return information and are excepted from disclosure under section 552.101 of the Government Code as information made confidential by federal law.

Next, section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

As you acknowledge, this office has also found that personal financial information not related to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy). This office has also ruled, however, that the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). We have marked information in the submitted documents that is excepted from disclosure under section 552.101 in conjunction with common-law privacy.

We next address your claim under section 552.117 of the Government Code for the personnel records in Exhibit C and the information in Exhibit D. Section 552.117(a)(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 elect to keep this information confidential pursuant to section 552.024. Whether a particular piece of information is excepted under 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 department may only withhold information under section 552.117 on behalf of current or former officials or employees who elected to keep information confidential pursuant to section 552.024 prior to the date on which the request for this information was made.

We note that the named employee at issue elected to keep his home address and telephone number, social security number, and family member information confidential. However, we are unable to determine whether the employee made his section 552.024 election prior to the date the department received the present request. Consequently, if the employee timely elected to keep his home address and telephone number, social security number, and family member information confidential, the department must withhold this information pursuant to section 552.117(a)(1) of the Government Code. However, if the employee did not elect to keep this information confidential prior to the date of the present request, the information may not be withheld pursuant to section 552.117.

We note that you have marked the employee's post office box number as information you seek to withhold under section 552.117. An individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and

cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection). We further note that in one of the submitted documents, you seek to withhold the social security numbers of individuals other than the named employee at issue. We determine that these social security numbers, which we have marked, are not responsive to the present request and need not be released.

With respect to the social security number of the named employee at issue, we note that if the employee did not timely elect to keep his social security number confidential, the social security number may nevertheless be confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *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.* We have no basis for concluding that the employee's social security number is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act (the "Act") imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, the department should ensure that the social security number was not obtained and is not maintained pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, we note that the submitted documents contain additional information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

We have marked Texas driver's license information and Texas vehicle registration information that the department must withhold under section 552.130 of the Government Code. However, information that pertains to driver's licenses and vehicle registrations issued by another state may not be withheld pursuant to section 552.130.

In summary, the department may withhold the information in Exhibit B under section 552.107 of the Government Code as information protected by the attorney-client privilege. The FMLA records that you have marked must be withheld under section 552.101

of the Government Code in conjunction with federal law. We have marked medical records that may only be released as provided under the MPA. We have marked chiropractic services records that may only be released as provided under chapter 201 of the Occupations Code. Tax return information is confidential under federal law and must be withheld pursuant to section 552.101 of the Government Code. We have marked information that is excepted from disclosure under section 552.101 in conjunction with common-law privacy. If the employee timely elected to keep his home address and telephone number, family member information, and social security number confidential pursuant to section 552.024, the department must withhold this information under section 552.117(a)(1). We have marked non-responsive social security numbers that need not be released. The employee's social security number may be confidential under section 552.101 in conjunction with federal law. Information pertaining to Texas driver's licenses and Texas motor vehicle registrations must be withheld pursuant to section 552.130 of the Government Code. The remainder of the submitted information must be released 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).

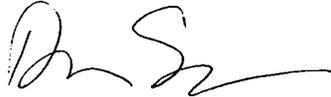
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 187375

Enc: Submitted documents

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