ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 31, 2003

Ms. Shellie Hoffman Crow
Walsh, Anderson, Brown,
Schulze & Aldridge, P.C.
P. O. Box 2156
Austin, Texas 78768

OR2003-9370

Dear Ms. Crow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193580.

The Austin Independent School District (the "district"), which you represent, received a request for information related to a named district employee and school, including information regarding the length of the named district employee's medical leave. You state that most of the requested information will be provided to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that, as you acknowledge, Document #2 constitutes a medical record, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 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.

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[1]Although you did not claim that any portion of the requested information was excepted from disclosure pursuant to section 552.117 of the Government Code within ten business days of the district's receipt of the written request, we will address your claim under this section since such a claim constitutes a compelling interest sufficient to overcome the existing presumption that any portions of the requested information to which section 552.117 is applicable are now public. *See* Gov't Code §§ 552.301(b), .302; *see also* Open Records Decision Nos. 150 at 2 (1977), 319 (1982).

> (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.

Occ. Code § 159.002(b), (c). 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). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See id.* § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

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). Based on our review of the submitted information, we agree that Document #2 is subject to the MPA. Absent the applicability of an MPA access provision, the district must withhold Document #2 pursuant to the MPA.

We now turn to your arguments for Document #1. You first assert that Document #1 is a medical record protected under the Americans with Disabilities Act (42 U.S.C.A. § 12101 *et seq.*) ("ADA"). You cite to section 12112(d)(3)(B) of title 42 of the United States Code, and section 1630.14 of title 29 of the Code of Federal Regulations to support this argument. Section 12112(d)(3) provides that

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if–

> A) all entering employees are subjected to such an examination regardless of disability;
>
> (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except 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; and
>
> (C) the results of such examination are used only in accordance with this subchapter.

42 U.S.C. § 12112(d)(3)(A)-(C). We find, however, that Document #1 does not relate to a preemployment medical examination. Therefore, section 12112(d)(3)(B) of title 42 of the United States Code does not apply to this document. Likewise, section 1630.14 of title 29 of the Code of Federal Regulations relates to preemployment medical inquiries, employment entrance medical examinations, and other job-related medical examinations. *See* 29 C.F.R. § 1630.14. You do not inform us that Document #1 relates to a preemployment medical inquiry, employment entrance medical examination, or other job-related medical examination. Thus, we conclude Document #1 does not constitute a medical record protected under either section 12112(d)(3)(B) of title 42 of the United States Code or section 1630.14 of title 29 of the Code of Federal Regulations.

You also claim that this document is protected under privacy principles. Section 552.102 of the Government Code 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.–Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. Accordingly, we will consider your section 552.102 claim in the context of the doctrine of common-law privacy under section 552.101 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Foundation*, 540 S.W.2d at 685. 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. After reviewing the submitted information, we find that it contains such highly intimate or embarrassing facts that are of no legitimate concern to the public, and thus conclude this information, which we have marked, is protected by common-law privacy and therefore must be withheld under section 552.101 of the Government Code.

You also assert that the employee's social security number is excepted under section 552.101 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). *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 inform us that the district maintains employees' social security numbers pursuant to provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 653a(a)(2)(B), (b)(1)(A). Under this federal law, an employer is required to furnish to the Directory of New Hires of the State in which a newly hired employee works, a report that includes the employee's social security number. 42 U.S.C. § 653a(b)(1)(A). For employees who were hired before this law was enacted, social security numbers were not obtained or maintained pursuant to the law and therefore, those numbers may not be withheld under section 552.101 and the federal law. Here, the employee whose social security number is at issue was hired by the department after the enactment of this law. Thus, the social security number at issue must be withheld under section 552.101.

Next, you argue that certain information in Document #1 is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former 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 such information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). You have provided documentation showing that the employee at issue did not wish to have his home phone number and home address printed in the staff directory. This form does not constitute a proper election under section 552.024 of the Government. Therefore, pursuant to section 552.117(a)(1), the district must withhold the information we have marked only if the employee in question elected, prior to the district's receipt of this request, to keep such information confidential. The district may not withhold such information under section 552.117 if the employee did not make a timely election under section 552.024.

In summary, we conclude that absent the applicability of an MPA access provision, the district must withhold Document #2 pursuant to the MPA. The district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The district must also withhold the employee's social security number under

section 552.101. Pursuant to section 552.117(a)(1), the district must withhold the information we have marked, but only if the employee in question elected, prior to the district's receipt of this request, to keep such information confidential. The district may not withhold such information under section 552.117 if the employee did not make a timely election under section 552.024. The remaining 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 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,

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 193580

Enc. Submitted documents

c: Ms. Heather Maze
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(w/o enclosures)