



OFFICE of *the* ATTORNEY GENERAL  
GREG ABBOTT

January 9, 2004

Mr. Jeffrey J. Horner  
Bracewell & Patterson L.L.P.  
711 Louisiana Street, Suite 2900  
Houston, Texas 77002-2781

OR2004-0171

Dear Mr. Horner:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 193992.

The Galena Park Independent School District (the "district"), which you represent, received a request for the personnel file of a named individual. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that portions of the submitted information constitute medical record information, 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.
- (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). 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). We have marked the medical record information that is subject to the MPA. Absent the applicability of an MPA access provision, the district must withhold this information pursuant to the MPA.

We next note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). In this instance, the requested information includes completed evaluations made of, for, or by the district, and contracts relating to the expenditure of public or other funds by the district. The district must release the completed evaluations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 or expressly confidential under other law. You do not claim that the evaluations are excepted under section 552.108. Therefore, you may withhold this information only if it is confidential under other law. Further, the district must release the submitted contracts unless they are expressly confidential under other law. Because sections

552.101, 552.102, and 552.117 constitute "other law" for purposes of section 552.022, we will consider whether these exceptions apply to the information subject to section 552.022 along with the remaining submitted information.

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). Section 552.102(a) is generally applicable to information relating to a public official or employee. See Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The protection of section 552.102(a) is the same as the protection provided by the common-law right to privacy under section 552.101 of the Government Code.<sup>1</sup> *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together.

Information must be withheld from disclosure under the common-law right to privacy when 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. 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 *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. See *id.* at 683.

In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, see Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (1992), 545 (1990); 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); and identities of victims of sexual abuse, see Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Having reviewed the submitted records, we conclude that no portion of the information at issue is protected by common-law privacy. See Open Records Decision Nos. 470 at 4 (1987) (employee's job performance does not generally constitute that person's private affairs), 444

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<sup>1</sup>Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy.

at 4 (1986) (public will frequently have legitimate interest in personnel file information relating to public employees, and thus even highly intimate or embarrassing information generally will be open to public), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 400 at 5 (1983) (information protected only if release would lead to clearly unwarranted invasion of employee's privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow); *cf.* Gov't Code § 411.082(2) (definition of criminal history record information does not include driving record information). Consequently, no portion of the submitted information may be withheld under section 552.101 or section 552.102 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code 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 of the Government Code. *See* Gov't Code § 552.117(a)(1).<sup>2</sup> However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 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). For an employee who timely elected to keep personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold this information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential.

Further, if a timely election was not made, the submitted social security number must be withheld in some circumstances 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 and 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 social security number in the responsive information is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the

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<sup>2</sup>In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. *See* Act of May 30, 2003, 78th Leg., R.S., ch. 947, 2003 Tex. Sess. Law Serv. 2822 (Vernon) (to be codified as amendment to section 552.117).

district should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

We further note that section 552.130 of the Government Code prohibits the release of 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.* Thus, we have marked the types of information in the submitted documents that the district must withhold pursuant to section 552.130.

In summary, we conclude that 1) absent the applicability of an MPA access provision, the district must withhold the marked medical record information pursuant to the MPA; 2) if the employee in question timely elected to keep her personal information confidential, the district must withhold her section 552.117(a)(1) information; 3) if a timely election was not made, the social security number may be confidential under federal law; and 4) the district must withhold the section 552.130 information. All 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 193992  
Enc. Submitted documents

c: Mr. Loren R. Smith  
Kelly, Smith & Murrah, P.C.  
4305 Yoakum Boulevard  
Houston, Texas 77006  
(w/o enclosures)