



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 30, 2004

Mr. Kevin D. Pagan
Deputy City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR2004-2526

Dear Mr. Pagan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198214.

The City of McAllen (the "city") received a request for copies of the personnel file and letters of reprimand or suspensions for a named individual. You claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under chapter 552 of the Government Code. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See Gov't Code* § 552.301(a), (b). You state that the city received this request on January 5, 2004. However, you did not request a ruling from this office until January 22, 2004, more than 10 business days after receiving the request. Thus, the city failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex.

App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because sections 552.101 and 552.117 can provide compelling reasons to withhold information, we will address your arguments concerning these exceptions.

You claim that certain portions of the submitted information are confidential under section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d-1320d-8.¹ At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Public Information Act (the “Act”). Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the city may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies. Consequently, the city may not withhold any of the submitted information under section 552.101 in conjunction with the Privacy Rule.

¹ Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by HIPAA.

Section 552.101 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. *Indus. Found. v. Tex. 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 determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the Industrial Foundation test. See Open Records Decision Nos. 600 (1992) (Employee's Withholding Allowance Certificate; 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), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989). 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. Thus, information about the essential features of an employee's participation in a group insurance program funded in part by the state involves him in a transaction with the state and, therefore, is not excepted from disclosure by a right of privacy. On the other hand, information relating to an employee's choice of insurance carrier and his election of optional coverages is confidential under the right of privacy. *Id.* at 10-11. Similarly, this office has determined that information revealing the personal financial decision to voluntarily have certain deductions made from an employee's paycheck meets the Industrial Foundation test. Open Records Decision No. 545 (1990). We have marked the personal financial information that is excepted from disclosure under section 552.101 in conjunction with common law privacy.

You also contend that certain portions of the submitted information are confidential under section 552.117. Section 552.117 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 timely elect to keep this information confidential pursuant to section 552.024. Whether information is protected by section 552.117 must be determined at the time the request for information is made. See Open Records Decision No. 530 at 5 (1989). Therefore, the city 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. In this instance, the employee requested confidentiality under section 552.024 on January 16, 2004. The request for information was received on January 5, 2004. Consequently, since the employee did not timely elect to keep his personal information confidential, the city may not withhold this information under section 552.117 of the Government Code.

We note, however, that although the employee did not timely elect to keep his social security number confidential pursuant to section 552.024, his social security number and others in the submitted information may 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 social security number in the submitted documents 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 imposes criminal penalties for the release of confidential information. Prior to releasing social security numbers, the city should ensure that the social security numbers were not obtained and are not maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

We note that the submitted documents contain information that is excepted from disclosure pursuant to section 552.130 of the Government Code.² Section 552.130 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[.]

Accordingly, you must withhold the Texas motor vehicle information we have marked.

Additionally, we note that a portion of the submitted information is confidential under section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Thus, pursuant to this section, the city must withhold the account numbers we have marked.

Finally, section 552.137 of the Government Code provides:

² The Office of the Attorney General will raise mandatory exceptions like sections 552.130, 552.136 and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

....

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. We find that the e-mail address you have marked is excepted from disclosure under section 552.137(a). Accordingly, we conclude that, unless consent to release has been granted, the city must withhold this e-mail address pursuant to section 552.137(a) of the Government Code.

In summary, the city must withhold the personal financial information we have marked under section 552.101 in conjunction with common law privacy. The city must also withhold the Texas motor vehicle information we have marked pursuant to section 552.130, the account numbers we have marked under section 552.136 and the e-mail address you have marked under section 552.137 of the Government Code. The remaining 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,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/seg

Ref: ID# 198214

Enc. Submitted documents

c: Dr. Anthony Rogers
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San Antonio, Texas 78254
(w/o enclosures)