



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 13, 2004

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

OR2004-2975

Dear Mr. Pagan:

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# 199236.

The City of McAllen (the "city") received a request for information related to a named individual. You state that the city will release some of the requested information to the requestor. You claim that portions of the requested information are 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 note that a portion of the submitted information constitutes 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* Occ. Code § 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 city must withhold this information pursuant to the MPA.¹

Next we note that some of the submitted information may be confidential by law. Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by another statute. We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a fire fighter's civil service file that a city's civil service director is required to maintain, and an internal file that the fire department may maintain for its own use. Local Gov't Code § 143.089(a), (g).

The civil service file must contain all records of a fire fighter's commendations, misconduct that resulted in disciplinary action under chapter 143, and supervisor evaluations.² *See id.* § 143.089(a); *see also Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.) (holding that all investigatory materials in case resulting in disciplinary action are "from the employing department" and must be forwarded for inclusion in civil service file when such records are held by or in possession of department because of its investigation into misconduct). However, a document relating to a fire fighter's alleged misconduct may not be placed in his civil service personnel file if there is insufficient

¹As our ruling on this issue is dispositive, we need not address your claim under the Health Insurance Portability and Accountability Act ("HIPAA"). *See* Open Records Decision No. 681 (2004) (HIPAA, 42 U.S.C. §§ 1320d-1320d-8, does not make information confidential for purpose of section 552.101 of Government Code).

²Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055.

evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information contained in the civil service file generally must be released, unless it is shown that some provision of chapter 552 of the Government Code permits the information to be withheld from public disclosure. See Local Gov't Code § 143.089(f); Gov't Code §§ 552.006, .021; Open Records Decision No. 562 at 6 (1990).

Section 143.089 also allows, but does not require, a fire department to maintain its own personnel file concerning the fire fighter for the department's own internal use. See Local Gov't Code § 143.089(g). Information that reasonably relates to a fire fighter's employment relationship with the fire department and that is maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must be withheld pursuant to section 552.101 of the Government Code. See *id.*; see also *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied) (“the legislature intended to deem confidential the information maintained by the . . . department for its own use under subsection (g)”); *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under section 143.089(g) to “information reasonably related to a police officer's or fire fighter's employment relationship”); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of section 143.089(a) and (g) files).

In this instance the city received a request for a fire fighter's “personnel file.” Because the request is broadly worded and was directed to the city, it encompasses both the civil service file maintained by the city's civil service commission and the personnel file that the city's fire department maintains for its internal use. You have not informed us whether the submitted documents represent records maintained by the city's civil service commission, the fire department, or both. As noted above, section 143.089(a) requires that the city maintain copies of some of the submitted documents, such as periodic personnel evaluations and letters of commendation, in the civil service commission file regarding this fire fighter. However, section 143.089 does not specifically dictate where other submitted documents, such as the fire fighter's driving record and payroll records, are to be maintained, and such records could be maintained in either the civil service commission file or the fire department's confidential internal file. Because you have not informed us where or how the submitted records are maintained, we must rule conditionally. To the extent the submitted documents are records maintained in the fire department's internal personnel file, they are confidential under section 143.089(g) and must be withheld under section 552.101. However, to the extent these records are maintained by the city's civil service commission, they are subject to disclosure under the Act and may only be withheld if an exception to disclosure applies. Because you have not informed us where or how these documents are maintained, we must consider whether any other exception to disclosure applies.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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). 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. *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)); 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); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history); certain personal choices relating to financial transactions between the individual and the governmental body, *see* Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Upon review, we conclude that some of the information submitted to this office is both highly intimate or embarrassing and of no legitimate public interest. The city must withhold the information we have marked as coming within the common-law right of privacy under section 552.101 of the Government Code.

You next assert that section 552.117(a)(1) of the Government Code is applicable to some of the submitted information. 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 request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117 also encompasses a personal cell telephone number, provided that the cell phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). 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). You have provided us with a copy of the employee's election form, dated January 27, 2004. We note that, while you do not

inform us of the date the request for information was received by the city, the request itself is dated January 23, 2004. Thus, it is unclear whether the employee made the request for confidentiality under section 552.024 before or after the request for information at issue was received by the governmental body. As we are unable to make this determination, we must rule in the alternative. If the employee at issue timely elected to keep this information confidential prior to the date the city received the present request, the city must withhold the information that you have marked, as well as some additional information that we have marked, in the submitted documents pursuant to section 552.117(a)(1). However, if the employee's section 552.024 election was made after the date the city received the present request, section 552.117 is inapplicable, and the information may not be withheld on that basis.

Even if the employee at issue failed to make a timely section 552.024 election, the social security number contained in the submitted documents may be excepted from disclosure 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 file 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 Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the city should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

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. Accordingly, the city must withhold the Texas driver's license information we have marked pursuant to section 552.130 of the Government Code.

We note that account numbers contained in the submitted records may be subject to section 552.136 of the Government Code, which makes certain access device numbers confidential and provides as follows:

- (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. Accordingly, we conclude that the city must withhold the account numbers that we have marked pursuant to section 552.136 of the Government Code.

Next, we observe that the submitted records contain e-mail addresses. Section 552.137 of the Government Code provides:

(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 have marked the e-mail addresses that are excepted from disclosure under section 552.137(a). Accordingly, we conclude that, unless consent to release has been granted, the city must withhold these e-mail addresses pursuant to section 552.137(a) of the Government Code.

In summary, we have marked medical records, which may only be released in accordance with the MPA. To the extent the submitted information is maintained in the fire department's internal file concerning the named individual, it is confidential under

section 143.089(g) and must be withheld under section 552.101. To the extent the submitted information is maintained in the city's civil service commission file concerning this individual, it is subject to release with the following exceptions: 1) the city must withhold the information we have marked under section 552.101 of the Government Code and common-law privacy; 2) if the employee made a timely section 552.024 election, the city must withhold the information that you have marked, as well as some additional information that we have marked, in the submitted documents pursuant to section 552.117(a)(1); 3) a social security number may be confidential under federal law; 4) the city must withhold the Texas driver's license information we have marked under section 552.130 of the Government Code; 5) the marked account numbers must be withheld under section 552.136; and 6) unless consent to release has been granted, the city must withhold the marked section 552.137 information.

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# 199236

Enc. Submitted documents

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(w/o enclosures)