



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2004

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2004-3394

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 200255.

The Texas Department of Transportation (the "department") received a request for all records in the requestor's personnel file and in files regarding him maintained by his supervisors. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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. You contend that portions of Exhibit B are excepted from disclosure under section 552.101 in conjunction with the Family and Medical Leave Act (the "FMLA"). We note that section 825.600 of chapter V of volume 29 of the Code of Federal Regulations provides that

(g) [r]ecords and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for the purposes of the 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[.]

¹ 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.

29 CFR § 825.600(g). You also assert that portions of Exhibit B are confidential under the Americans with Disabilities Act of 1990 (the "ADA"). Because the FMLA defers to the confidentiality provisions of the ADA when the ADA is applicable, we will address whether these portions of Exhibit B are confidential under the ADA.

The ADA provides for the confidentiality of certain medical records of employees and applicants. Specifically the ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

You state that there appears to be no provision permitting the release of confidential information with the consent of the employee or after the employee's death. After reviewing your arguments and the information at issue, we find that the information we have marked in Exhibit B is confidential under the ADA and must be withheld under section 552.101 of the Government Code. The exceptions to section 12112(d) of the ADA are not applicable in this instance.²

You also argue that portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with 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). This office has determined that information revealing certain types of personal financial choices relating to a transaction between an individual and a governmental body are protected under common-law privacy. *See* Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage protected by privacy). The submitted documents include information regarding the requestor's insurance coverage. We note, however, that the requestor has a special right of access to this information pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023 (a person has a special right of access to information that is excepted from public disclosure under laws

² As we are able to make this determination, we need not address your remaining arguments regarding disclosure of this information.

intended to protect the person's privacy interest as subject of the information). Consequently, the department must release the submitted insurance information to the requestor.

Finally, you assert section 552.117(a)(1) of the Government Code with regard to some of the information in Exhibit B. This section 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). 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 state that these are department employees "who elected to keep this personal information confidential." In addition, you have supplied this office with copies of the forms in which these employees have timely elected to keep their personal information confidential. We agree that you must withhold the submitted social security numbers in Exhibit B under section 552.117(a)(1) of the Government Code for these employees.

We again note that under section 552.023 of the Government Code a person has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. Therefore, the requestor has a special right of access to the requestor's social security number, and it must be released in this instance.

In summary, we conclude that: 1) the department must withhold the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with the ADA; 2) the department must withhold the social security numbers you have marked under section 552.117(a)(1); and 3) the requestor has a special right of access to the requestor's insurance information and social security number.

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).

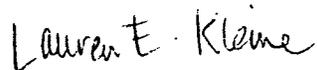
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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# 200255

Enc. Submitted documents

c: Mr. Bobby G. Hill
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(w/o enclosures)