



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 28, 2005

Mr. Don R. Bradley  
Assistant General Counsel  
Texas Department of State Health Services  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756

OR2005-05731

Dear Mr. Bradley:

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# 227009.

The Texas Department of State Health Services (the "department") received a request for information pertaining to a named former employee of the department. You state that some of the requested information has been or will be released, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides the following:

(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). Medical records must be released upon 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. Occ. Code §§ 159.004, 159.005. 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. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the portion of the submitted information that constitutes medical records and that may only be released in accordance with the MPA. Open Records Decision No. 598 (1991).

Section 552.101 also encompasses chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) states that "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential." Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the information that constitutes mental health records and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses chapter 401 of the Occupations Code. This chapter provides for investigation of complaints filed with the State Board of Examiners for Speech-Language Pathology and Audiology (the "board"), which is a part of the department. Section 401.2535 provides in relevant part the following:

(h) All information and materials subpoenaed or compiled by the board in connection with a complaint and investigation are confidential and not subject to disclosure under Chapter 552, Government Code, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the board or its employees or agents involved in discipline of the holder of a license[.]

(i) The filing of formal charges by the board against a holder of a license, the nature of those charges, disciplinary proceedings of the board, and final disciplinary actions, including warnings and reprimands, by the board are not confidential and are subject to disclosure in accordance with Chapter 552, Government Code.

Occ. Code § 401.2535(h), (i). After review of your arguments and the submitted information, we find you have not established that the submitted documents contain information or materials subpoenaed or compiled by the board in connection with a complaint and investigation under chapter 401 of the Occupations Code; therefore, the submitted information is not confidential under section 401.2535 of the Occupations Code, and the department may not withhold any of the submitted information under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses chapter 402 of the Occupations Code. This chapter provides for the investigation of complaints filed with the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments (the "committee"), which we understand is part of the department. Section 402.154 provides in relevant part as follows:

(h) All information and materials subpoenaed or compiled by the committee in connection with a complaint and investigation are confidential and not subject to disclosure under Chapter 552, Government Code, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the committee or its agents or employees who are involved in discipline of the holder of a license, except that this information may be disclosed to:

- (1) persons involved with the committee in a disciplinary action against the holder of a license;
- (2) professional licensing or disciplinary boards for the fitting and dispensing of hearing instruments in other jurisdictions;
- (3) peer assistance programs approved by the board under Chapter 467, Health and Safety Code;
- (4) law enforcement agencies; and
- (5) persons engaged in bona fide research, if all individual-identifying information has been deleted.

- (i) The filing of formal charges by the committee against a holder of a license, the nature of those charges, disciplinary proceedings of the committee, and final disciplinary actions, including warnings and reprimands, by the committee are not confidential and are subject to disclosure in accordance with Chapter 552, Government Code

Occ. Code § 402.154(h), (i). After review of your arguments and the submitted information, we agree you have established that some of the submitted information was subpoenaed or compiled by the committee in connection with a complaint and investigation. You state that the exceptions to confidentiality under section 402.154(h) are not applicable, and you indicate that the submitted information is not subject to release under section 402.154(i). Therefore, we find that this information, which we have marked, is confidential under section 402.154 of the Occupations Code, and the department must withhold it under section 552.101 of the Government Code. However, we find you have not established that the remaining documents contain information or materials subpoenaed or compiled by the committee in connection with a complaint and investigation under chapter 402 of the Occupations Code; therefore, none of the remaining information is confidential under section 402.154 of the Occupations Code, and the department may not withhold any remaining information under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses chapter 605 of the Occupations Code. This chapter provides for the investigation of complaints filed with the Texas Board of Orthotics and Prosthetics by the Commissioner of Public Health, which we understand are both part of the department. Section 605.2021 provides in relevant part the following:

(h) All information and materials subpoenaed or compiled by the [Texas Board of Orthotics and Prosthetics] in connection with a complaint and investigation are confidential and not subject to disclosure under Chapter 552, Government Code, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the board or its employees or agents involved in discipline of the holder of a license, except that this information may be disclosed to:

- (1) persons involved with the [Texas Board of Orthotics and Prosthetics] in a disciplinary action against the holder of a license;
- (2) professional orthotist or prosthetist disciplinary boards in other jurisdictions;
- (3) peer assistance programs approved by the board under Chapter 467, Health and Safety Code;
- (4) law enforcement agencies; and

(5) persons engaged in bona fide research, if all individual-identifying information has been deleted.

(i) The filing of formal charges by the [Texas Board of Orthotics and Prosthetics] against a holder of a license, the nature of those charges, disciplinary proceedings of the board, and final disciplinary actions, including warnings and reprimands, by the [Texas Board of Orthotics and Prosthetics] are not confidential and are subject to disclosure in accordance with Chapter 552, Government Code

Occ. Code § 605.2021(h), (i). After review of your arguments and the submitted information, we agree you have established that some of the submitted information was subpoenaed or compiled by the Texas Board of Orthotics and Prosthetics in connection with a complaint and investigation. You state that the exceptions to confidentiality under section 605.2021(h) are not applicable, and you indicate that the submitted information is not subject to release under section 605.2021(i). Therefore, we find that this information, which we have marked, is confidential under section 605.2021 of the Occupations Code, and the department must withhold it under section 552.101 of the Government Code. However, we find you have not established that the remaining documents contain information or materials subpoenaed or compiled by the Texas Board of Orthotics and Prosthetics in connection with a complaint and investigation under chapter 605; therefore, none of the remaining information is confidential under section 605.2021, and the department may not withhold any remaining information under section 552.101 of the Government Code on that ground.

Section 552.101 also encompasses federal law. The Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, 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, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions 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 do not inform us the remaining documents are contained in a separate medical file maintained in accordance with the ADA. In addition, you have not established that the remaining documents contain information about an individual's disability, or that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual; therefore, we find you have not established that any of the remaining information

is confidential under the ADA, and the department may not withhold the information under section 552.101 of the Government Code on that ground.

Section 552.101 also encompasses the Family and Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Section 825.500 of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states the following:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of 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 . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). We have marked the submitted information that is confidential under the FMLA. We also find that none of the release provisions of the FMLA applies to this information. Thus, we conclude that this information must be withheld pursuant to section 552.101 in conjunction with the FMLA.

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. This office has found that the following types of information are excepted from required public disclosure under common law privacy: 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 the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). But this office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We have marked the information that is confidential under common law privacy and that the department must withhold under section 552.101. We do not find the remaining information to be highly intimate or embarrassing information; therefore, this information is not confidential under common law privacy, and the department may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). After review of the remaining information, we find that it does not contain information that is confidential under constitutional privacy; therefore, the department may not withhold it under section 552.101 on that ground.

You assert that some of the submitted information is excepted under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in

capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The department asserts that some of the submitted information consists of confidential communications between attorneys for and employees of the department made for the purpose of rendering professional legal advice. Based on this representation and our review of the information at issue, we agree the department has established that the information we have marked under section 552.107 consists of privileged attorney-client communications that the department may withhold under that section; however, we find the department has not established that any of the remaining information consists of privileged attorney-client communications that the department may withhold under section 552.107.

You contend that some of the submitted information must be withheld under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the current 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 request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5* (1989). Thus, we agree that the department must withhold the information it has marked, as well as the information we have marked, under section 552.117, if the employees at issue elected, prior to the department’s receipt of the request for information, to keep such information confidential.

We note that some of the information at issue may be excepted under section 552.1175 of the Government Code, which provides in part the following:

Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). The submitted documents contain information pertaining to an officer who does not work for the department. If this individual is currently a licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b), the department must withhold the information, which we have marked, under section 552.1175.

You assert that some of the remaining information is excepted under section 552.130 of the Government Code, which provides the following:

(a) Information is excepted from the requirements 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[.]

Gov't Code § 552.130(a). The department must withhold the Texas motor vehicle record information we have marked under section 552.130.

The department asserts that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the

public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the department must withhold the e-mail addresses you have marked, as well as an address we have marked, under section 552.137.

Finally, we note that the submitted information contains social security numbers. Section 552.147 of the Government Code<sup>1</sup> provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the department must withhold the social security numbers contained in the submitted information under section 552.147.<sup>2</sup>

To conclude, the marked medical records may only be released in accordance with the MPA and the marked mental health records may only be released in accordance with chapter 611 of the Health and Safety Code. Pursuant to section 552.101 of the Government Code, the department must withhold the marked information that is confidential under sections 402.154 of the Occupations Code, 605.2021 of the Occupations Code, the FMLA, and common law privacy. It must also withhold the following: (1) the information marked under section 552.117 if the employees at issue elected, prior to the department’s receipt of the request for information, to keep such information confidential, (2) the information marked under section 552.1175 if the individual at issue is currently a licensed peace officer who elects to restrict access to this information in accordance with section 552.1175(b); (3) the motor vehicle record information marked under section 552.130; (4) the e-mail addresses marked under section 552.137; and (5) the social security numbers under section 552.147. The department may withhold the information marked under section 552.107. It must release the remaining information at issue.

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

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<sup>1</sup>Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov’t Code § 552.147).

<sup>2</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

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).

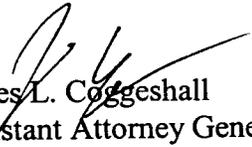
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,

  
James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/seg

Mr. Don R. Bradley - Page 12

Ref: ID# 227009

Enc. Submitted documents

c: Mr. J. Connally Wood  
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(w/o enclosures)