ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2005

Ms. Julie Joe
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2005-07123

Dear Ms. Joe:

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# 229945.

The Travis County Facilities Management Department (the "department") received a request for a complete copy of a named department employee's file. You state that most of the requested information will be released. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Initially, we note that a portion of the submitted information is subject to the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the

[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.

Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

> [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 information that is subject to the FMLA. Further, we find that none of the release provisions of the FMLA apply to this marked information. Thus, we conclude that this marked information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the FMLA.

Second, you note that the submitted documents include an Employment Eligibility Verification Form, I-9 form. Title 8, section 1324a of the United States Code, which is also encompassed by section 552.101, provides that this form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of these forms under the Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the submitted I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Next, you argue that a portion of the submitted information constitutes medical records that are confidential under section 552.101 in conjunction with the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is

> confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (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(a)-(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). 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. The consent must specify (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, .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. In this instance, we are unable to determine whether the requestor is a person authorized to act on behalf of the individual whose medical records are at issue. Thus, absent the applicability of an MPA access provision, the department must withhold this marked information pursuant to the MPA.

The department further contends that some of the remaining submitted information is subject to section 201.402 of the Occupations Code, which is also encompassed by section 552.101. Chapter 201 of the Occupations Code governs the practice of chiropractic treatment. Section 201.402 of the Occupations Code provides in relevant part as follows:

> (a) Communications between a chiropractor and a patient relating to or in connection with any professional services provided by a chiropractor to the patient are confidential and privileged and may not be disclosed except as provided by this subchapter.
>
> (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are confidential

> and privileged and may not be disclosed except as provided by this subchapter.
>
> (c) A person who receives information from the confidential communications or records, excluding a person listed in Section 201.404(a) 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 § 201.402(a)-(c). Chapter 201 includes exceptions to confidentiality and consent provisions. *See id.* §§ 201.403,.404,.405. We agree that the information you have marked is subject to chapter 201 of the Occupations Code. Accordingly, the department may release this information only if chapter 201 of the Occupations Code permits the department to do so.

Additionally, you assert that some of the submitted information is excepted from disclosure under section 552.101 in conjunction with section 402.083 of the Labor Code. Section 402.083(a) of the Labor Code states that "[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the [Texas Workers' Compensation Commission (the "commission")] except as provided by this subtitle." Labor Code § 402.083(a). In Open Records Decision No. 533 (1989), the City of Brownsville received a request for similar information. This office construed the predecessor to section 402.083(a) to apply only to information that the governmental body obtained from the Industrial Accident Board, now the commission. You have not informed us, and the documents do not reflect, that they were obtained from the commission. Therefore, the information at issue is not confidential under section 402.083, and it may not be withheld on that basis.

Section 552.107 of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107. 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 Tex. 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 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 states that the marked communications at issue constitute confidential attorney-client communications between or among lawyers or lawyer representatives of the department. The department further contends that these communications were made for the purpose of facilitating the rendition of professional legal services and were intended to be confidential. Having considered these representations and the information at issue, we find that the department has established that the marked information constitutes privileged attorney-client communications that may be withheld pursuant to section 552.107.

Finally, the department raises section 552.136 of the Government Code for bank account numbers in the remaining submitted information. 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. An access device number is one that 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." *Id.* The department must, therefore, withhold the account numbers it has marked under section 552.136 of the Government Code.

In summary, the department must withhold the information we have marked pursuant to section 552.101 in conjunction with the FMLA. The submitted I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system. Absent the applicability of an MPA access provision, the department must withhold the marked medical records pursuant to the MPA. The

department may only release the marked chiropractic information if chapter 201 of the Occupations Code permits the department to do so. The department may withhold the marked attorney-client communications pursuant to section 552.107 of the Government Code. The marked bank account number must be withheld pursuant to section 552.136 of the Government Code. The remaining submitted information must be released.[2]

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, 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).

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[2] We note that some of this information is confidential and not subject to release to the general public. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023 (person or person's authorized representative has 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). Because such information is confidential with respect to the general public, if the department receives another request for this information from an individual other than this requestor or his client, the department should again seek our decision.

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,

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Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 229945

Enc. Submitted documents

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(w/o enclosures)