ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2005

Ms. Irina Visan
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2005-11069

Dear Ms. Visan:

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# 237767.

The City of Rowlett (the "city"), which you represent, received a request for the personnel file of a named former employee. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.114, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.[1]

Initially, we note that some of the submitted information is not responsive to the instant request. Information that is not responsive to this request, which we have marked, need not be released. Moreover, we do not address such information in this ruling.

Next, we note that the submitted information contains medical records. Section 552.101 of the Government Code 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. Access to medical records is governed by the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides:

[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.

> (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. Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision Nos. 598 (1991). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Accordingly, the documents we have marked may be released only in accordance with the MPA.

You claim that the submitted information contains a W-4 form that is confidential under section 6103(a) of Title 26 of the United States Code. Section 6103(a) provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Opinion MW-372 (1981). Accordingly, we conclude that the city must withhold the W-4 form pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

You claim that the submitted information contains an I-9 Form. Section 552.101 of the Government Code also encompasses section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 "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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Here, you state that the release of the I-9 form would be "for purposes other than for enforcement" of the referenced federal statutes. Therefore, the I-9 form is confidential under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You claim that portions of the submitted information are excepted from disclosure under section 552.117. 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. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *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 received. In this case you inform us that the former employee whose records are at issue timely elected to keep her personal information confidential under section 552.024. After reviewing the documents provided, we note that the former employee chose to withhold her home address and telephone number from public disclosure and did not choose to withhold her social security number or family member information. Thus, the city must only withhold the former employee's home address and telephone number, which we have marked, under section 552.117(a)(1) of the Government Code. Her social security number and family member information may not be withheld under section 552.117(a)(1) of the Government Code.

We note, however, that the former employee's social security number must be withheld under section 552.147 of the Government Code.[2] Section 552.147 provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the city must withhold the social security number under section 552.147 of the Government Code.[3]

You claim that some of the submitted information is excepted from public disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Common-law privacy protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types 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 certain personal financial decisions are excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy). Accordingly, you must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

---

[2]Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, ch. 397, 2005 Tex. Sess. Law Serv. 1091 (Vernon) (to be codified at Tex. Gov't Code § 552.147).

[3]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.

You claim that the submitted information contains a transcript that is excepted from disclosure under section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records maintained at an educational institution funded completely or in part by state revenue. Gov't Code § 552.114. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* Open Records Decision No. 539 (1990). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Section 552.026 of the Government Code provides that "information contained in education records of an educational agency or institution" may only be released under the Act in accordance with FERPA.

We note that the department is not an educational agency or institution. However, FERPA also contains provisions governing access to information in educations records transferred by an educational agency or institution to a third party. FERPA provides that an educational agency or institution may only transfer personal information to a third party "on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student." 20 U.S.C. § 1232g(b)(4)(B). Federal regulations provide that a third party that receives such information from an educational agency may use the information only for the purposes for which the disclosure was made. 34 C.F.R. § 99.33(a)(2). Here, you state that the city received the transcript directly from the educational institution. Therefore, pursuant to sections 1232g(b)(4)(B) and 99.33(a)(2), the city may only release this transcript upon consent of the named former employee.

You claim that the submitted information contains driver license information that is excepted under section 552.130 of the Government Code. In relevant part, section 552.130 provides:

> (a) Information is excepted from required public disclosure 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. Upon review, we agree that you must withhold the Texas-issued motor vehicle record information, which we have marked, under section 552.130 of the Government Code.

We note that the submitted information contains an e-mail address. Section 552.137 of the Government Code 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). The e-mail address contained in the submitted information is not specifically excluded by section 552.137(c). Therefore, unless the individual whose e-mail address is at issue consented to release of the e-mail address, the city must withhold it in accordance with section 552.137 of the Government Code.

In summary, we have marked the documents that may only be released in accordance with the MPA. The city must withhold the W-4 form under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. The I-9 form is confidential under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system. The city must withhold the information we have marked under section 552.117(a)(1). The city must withhold the social security number under section 552.147 of the Government Code. The city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. Without the consent of the named former employee, the city must withhold the transcript under section 552.114. The city must withhold the Texas-issued motor vehicle record information we have marked under section 552.130. Without the consent of the named former employee, the city must withhold the e-mail address under section 552.137. The remaining responsive information must be released.

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

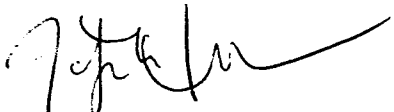
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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); *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 Office of the Attorney General 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. 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,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 237767

Enc. Submitted documents

c: Karen Tracy
3001 Motley Drive, Suite J
Mesquite, TX 75150
(w/o enclosures)