



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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Mr. Joe R. Tanguma
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P.O. Box 168046
Irving, Texas 75016

OR2007-00728

Dear Mr. Tanguma:

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# 269519.

The Connally Independent School District (the "district"), which you represent, received a request for the personnel file of a former district employee. You state that some responsive information has been released to the requestor. You claim that some of the remaining requested information is exempted from disclosure under sections 552.101, 552.102, 552.117, 552.130, 552.136, and 552.147 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." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. The submitted information contains a W-4 form. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the Internal Revenue Service with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax.

See 26 U.S.C. § 6103(b). The W-4 form that we have marked constitutes tax return information that must be withheld under section 552.101 of the Government Code in conjunction with federal law.

The submitted information contains medical records subject to the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 552.101 of the Government Code also encompasses the MPA. Section 159.002 of the Occupations Code 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). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Such 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, .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). We have reviewed the submitted information and marked the medical records subject to the MPA. Absent the applicability of an MPA access provision, the district must withhold these medical records pursuant to the MPA.

You seek to withhold Exhibit VI under section 552.101 in conjunction with section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted

section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

You contend that Exhibit VI constitutes a teacher evaluation for purposes of section 21.355. You also state the teacher at issue held a certificate under chapter 21 of the Education Code. Upon review, we find that Exhibit VI constitutes an evaluation for purposes of section 21.355. This information must be withheld under section 552.101 of the Government Code.

You next assert that Exhibit IV is confidential under section 815.503(a) of the Government Code. Section 815.503(a) provides as follows:

(a) Records of members, annuitants, retirees, beneficiaries, and alternate payees under retirement plans administered by the retirement system that are in the custody of the system or of an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure, and the retirement system is not required to accept or comply with a request for a record or information about a record or to seek an opinion from the attorney general, because the records are exempt from the public access provisions of [the Act], except as otherwise provided by this section.

Gov’t Code § 815.503(a). Section 815.503(b) provides in part that “[t]he retirement system may release the records . . . to another governmental entity having a legitimate need for the information to perform the purposes of the retirement system[.]” *Id.* § 815.503(b). Section 815.503(c) provides in part that “[t]he records of a member, annuitant, retiree, beneficiary, or alternate payee remain confidential after release to a person as authorized by this section.” *Id.* § 815.503(c).

You do not indicate to this office that the district maintains Exhibit IV as “an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system.” Gov’t Code § 815.503(a). We thus are unable to conclude that the information at issue constitutes “[r]ecords . . . that are in the custody of the system or of an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system.” *Id.* Therefore, section 815.503 does not make the information at issue confidential, and none of it may be withheld under section 552.101 of the Government Code on this basis.

We now turn to your privacy claim. Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Accordingly, we address the district’s section 552.102(a) claim in conjunction with its common law privacy claim under section 552.101.

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). 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. 540 S.W.2d at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Furthermore, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. Open Records Decision Nos. 600 (1992) (employee’s designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history) (1990), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common-law privacy protects assets and income source information).

Upon review of the submitted information and your arguments, we agree that some of the portions you have marked under common-law privacy are confidential and must be withheld under section 552.101. However, we find that you have failed to explain how any of the remaining portions constitute highly intimate or embarrassing information for the purposes of common-law privacy. Accordingly, we have marked the information that must be withheld under sections 552.101 and 552.102 in conjunction with common-law privacy. See Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute employee’s private affairs), 455 (1987) (public employee’s job performance or abilities generally not protected by privacy), 444 (1986) (concluding that public has obvious interest in having access to information concerning performances of

governmental employees, particularly employees who hold positions as sensitive as those held by members of law enforcement), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2-3 (1983) (public has interest in workplace conduct of public employee), 342 (1982). None of the remaining submitted information may be withheld on this basis.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which 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. 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 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find that you have failed to establish how any of the remaining information is confidential under constitutional privacy. Therefore, the district may not withhold any of the remaining information under section 552.101 on that basis.

You claim that portions of Exhibit I are excepted from public disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information from transcripts of professional public school employees other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). Thus, with the exception of the employee's name, courses taken, and degree obtained, the district must withhold the transcripts in Exhibit I pursuant to section 552.102(b) of the Government Code.

The remaining information contains social security numbers. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147. Therefore, the district must withhold the social security numbers in the remaining information under section 552.147 of the Government Code.

Finally, you assert that section 552.117 of the Government Code may be applicable to some of the remaining information. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone 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 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). Pursuant to section 552.117(a)(1), the district must withhold this personal information that pertains to a current or former employee of the district who elected, prior to the district's receipt of the request for information, to keep such

information confidential. Such information may not be withheld for individuals who did not make a timely election. Thus, the district must withhold the information you have marked if section 552.117 applies.

In summary, absent the applicability of an MPA access provision, the district must withhold the medical records we have marked pursuant to the MPA. The district must withhold (1) the W-4 form under section 552.101 of the Government Code in conjunction with federal law; (2) Exhibit VI under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, and (3) the information we have marked under sections 552.101 and 552.102 of the Government Code in conjunction with common-law privacy. With the exception of the employee's name, courses taken, and degree obtained, the district must withhold the transcripts in Exhibit I pursuant to section 552.102(b) of the Government Code. The district must withhold social security numbers under section 552.147 of the Government Code. The district must withhold the information you have marked under section 552.117 of the Government Code, if the employee whose information is at issue made a timely election. The remaining submitted information must be released to the requestor.¹

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

¹As our ruling is dispositive, we do not address your remaining claims.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/eb

Ref: ID# 269519

Enc. Submitted documents

c: Ms. Brenda Neel
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(w/o enclosures)