



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 21, 2007

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2007-07868

Dear Ms. Alexander:

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# 281676.

The Texas Department of Transportation (the "department") received a request for information regarding a named employee. You state that the department is withholding Texas driver's license numbers under section 552.130 of the Government Code pursuant to a previous determination issued to the department in Open Records Letter No. 2002-0465 (2002). *See Gov't Code* § 552.301(a) (allowing governmental body to withhold information subject to a previous determination). You claim that other responsive information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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<sup>1</sup>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.

Initially, we note that the submitted documents include information that is specifically excluded by the requestor.<sup>2</sup> The requestor has excluded the named employee's social security number, home address, telephone number, and family contact information from her request. Thus, any of this information within the submitted documents is not responsive to the present request. Accordingly, we do not address your arguments for this information, and the department is not required to release this information pursuant to this request.

Now we turn to your arguments for the submitted information. Section 552.101 of the Government Code exempts 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. Section 6103(a) of title 26 of the United States Code 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 Op. MW-372 (1981). Accordingly, the department must withhold the submitted W-4 form, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses the Medical Practices Act ("MPA"). You claim that a portion of the submitted information consists of medical records, access to which is governed by the MPA. Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(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.

*Id.* § 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

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<sup>2</sup>We note that in an e-mail dated April 10, 2007, the department contacted the requestor, who then clarified that she did not seek the social security number, home address, telephone number, or family contact information of the named employee. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear, governmental body may ask requestor to clarify or narrow request).

supervision of a physician. *See* Open Records Decision Nos. 487(1987), 370 (1983), 343 (1982). The submitted information does not contain information that was created by a physician; therefore, none of the information may be withheld on this basis.

You also raise section 552.101 of the Government Code in conjunction with the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* 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, 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. 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 or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); 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). We have marked the information that the department must withhold under section 552.101 of the Government Code in conjunction with the ADA.

The department also argues that some of the remaining information is confidential under section 552.101 in conjunction with the federal Family and 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 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). Upon review of the remaining information, we find that you have failed to demonstrate that any of the remaining information constitutes medical certifications, recertifications or medical histories of employees for purposes of the FMLA. Consequently, no portion of the remaining information may be withheld pursuant to section 552.101 of the Government Code on this basis.

We now address the department's assertions under common-law privacy. 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." Gov't Code § 552.102(a). 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* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85. Accordingly, we will consider your section 552.101 and section 552.102(a) privacy claims together.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. In addition, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is 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). Additionally, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g., Open Records Decision Nos. 600 at 9-12 (1992)* (participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, the details of an employee's enrollment in a group insurance program, and the

designation of the beneficiary of an employee's retirement benefits are protected by common-law privacy. *See* Open Records Decision No. 600 at 9-12.

Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common-law privacy under statutory predecessors to 552.101 and 552.102). Information that pertains to an employee's actions as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). We have marked the information that must be withheld under sections 552.101 and 552.102 of the Government Code in conjunction with common-law privacy. We conclude that the department may not withhold any of the remaining information on this basis under section 552.101 or section 552.102 of the Government Code.

In summary, the department must withhold the submitted 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. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA. The department must withhold the information we have marked pursuant to sections 552.101 and 552.102 of the Government Code in conjunction with common-law privacy. The remaining information must be released to the requestor.<sup>3</sup>

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).

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

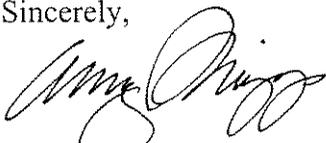
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/mcf

Ref: ID# 281676

Enc. Submitted documents

c: Ms. Jennifer Lepp Bryan  
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(w/o enclosures)