



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2009

Ms. Melinda Fletcher
Special Prosecution Unit
340 Highway 75N, Suite A
Huntsville, Texas 77320

OR2009-06139

Dear Ms. Fletcher:

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# 342242.

The Special Prosecution Unit (the "unit") received a request for a specific case file. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.130, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a submitted document, which we have marked, is not responsive to the instant request for information because it does not pertain to the requested case file. This ruling does not address the public availability of any information that is not responsive to the request, and the unit is not required to release that information in response to the request.

Next, we observe that you have redacted portions of the submitted information. You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any such information without seeking a ruling from this office. *See Gov't Code* § 552.301(a); Open Records Decision No. 673 (2000). As such, this type of information must be submitted

¹We understand you to raise section 552.147 of the Government Code to withhold social security numbers, as this is the proper exception for your assertion.

in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. Because we are able to discern the nature of the redacted information, we will address its public availability. In the future, the unit should refrain from redacting responsive information that it submits to this office in connection with a request for an open records ruling. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

We note that the submitted information includes 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. Section 552.101 encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part 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. *Id.* §§ 159.004. 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.

Next, we note that some of the remaining information includes mental health records that are confidential under section 611.002 of the Health and Safety Code. That section provides in part:

(a) Communications 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.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). We have marked mental health records that the unit must withhold under section 611.002. These records may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

We also note that the remaining information contains tax return information. Section 552.101 of the Government Code encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer’s designee. *See* 26 U.S.C. § 6103(c), (e)(1)(A)(I) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection (e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual’s right of access under the federal Freedom of Information Act). Section 6103(c) provides, unless the Secretary of Treasury determines that disclosure would seriously impair tax administration, tax record information may be released to any person or persons as the taxpayer may designate in a consent to such disclosure. *See* 26 U.S.C. § 6103(c). We note the requestor represents the individual whose tax information is at issue. Therefore, pursuant to section 6103(c) of title 26 of the United States Code, the unit must release the submitted W-4 forms if the requestor’s client has consented to the disclosure of his tax record information to his attorney and the Secretary of Treasury determines that such disclosure would not seriously impair federal tax administration. Otherwise, the submitted W-4 forms are confidential under section 6103 of title 26 of the United States Code and must be withheld from the requestor under section 552.101 of the Government Code.

You claim that some of the remaining information is excepted from public disclosure under section 552.101 in conjunction with section 58.007 of the Family Code. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Under section 58.007, juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential. *See id.* § 51.03(a), (b) (defining “delinquent conduct” and “conduct indicating a need for supervision”). For purposes of section 58.007, a “child” is person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). You state that some of the marked information pertains to identities of youths committed to the custody of the Texas Youth Commission (the “commission”). However, the information you have marked under section 58.007 is contained primarily in the internal investigations of juvenile corrections officers. Furthermore, some of the submitted information does not involve a juvenile named as a suspect or offender. Thus, none of the remaining information constitutes a law enforcement record or file concerning juvenile conduct. Accordingly, section 58.007 is not applicable to this information and it may not be withheld on that basis.

We note, however, that some of the remaining documents include information that is protected from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Information must be withheld under section 552.101 in conjunction with common-law privacy if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person; and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). 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. We find that the names and other identifying information in the submitted documents that identifies youths in the commission's custody, which you have marked, along with the additional information we have marked, must be withheld under section 552.101 in conjunction with common-law privacy. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007.

Next, we address your contention that a portion of the remaining information is excepted under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a Texas motor vehicle operator's or driver's license or permit. Gov't Code § 552.130(a)(1). We note that the requestor is the authorized representative for the individual whose Texas motor vehicle record information is listed in the remaining information. Section 552.130 protects personal privacy. Thus, the requestor, as the authorized representative of his client, has a right of access to his client's Texas motor vehicle record information under section 552.023, and it may not be withheld from him under section 552.130. *See generally id.* § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles).

We note that a portion of the remaining information may be confidential under sections 552.117 and 552.137 of the Government Code.² 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 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). For employees who timely elected to keep their personal information confidential, you must withhold this information, which we have marked, under section 552.117(a)(1) of the Government Code. The unit may not withhold this information under section 552.117(a)(1) for employees who did not make a timely election to keep the information confidential.

Section 552.137 states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Gov't Code.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception.

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

See id. § 552.137(c). We have marked the e-mail addresses in the submitted information that are not of a type specifically excluded by section 552.137(c). Accordingly, the unit must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owner affirmatively consents to its disclosure.

Section 552.147 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. *Id.* § 552.147. The requestor, as attorney for the individual at issue, has a special right of access to the individual's social security number pursuant to section 552.023 of the Government Code. *Id.* § 552.023. However, the unit may withhold the remaining social security numbers in the submitted information, not belonging to the requestor's client, under section 552.147 of the Government Code.

We note that portions of the submitted information appear to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the medical records we have marked may only be released in accordance with the MPA. The mental health records we have marked may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The unit must release the submitted W-4 forms if the requestor's client has consented to the disclosure of his tax record information to his attorney and the Secretary of Treasury determines such disclosure would not seriously impair federal tax administration. Otherwise, the submitted W-4 forms must be withheld from the requestor under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code. The unit must withhold the information in the submitted documents that identifies youths in the commission's custody under section 552.101 of the Government Code in conjunction with common-law privacy. The unit must withhold the information we have marked under section 552.117(a)(1) for employees who timely elected to keep their personal information confidential. The e-mail addresses we have marked must be withheld under section 552.137 of the Government Code, unless the owner affirmatively consents to its disclosure. The unit may withhold the social security numbers, not belonging to the requestor's client, under

section 552.147 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.³

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 342242

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

³We note that the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). However, if the unit receives another request for this particular information from a different requestor, then the unit should again seek a decision from this office.