



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 29, 2009

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2009-07333

Dear Ms. Sims:

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# 344985.

The City of Lubbock (the "city") received three requests for the personnel file of a named former city employee. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.117, 552.1175, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by statute, such as the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). You claim HIPAA, 42 U.S.C. §§ 1320d-1320d-8, governs portions of the submitted information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected

health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with, and is limited to, the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the city may withhold requested protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

You also raise section 552.101 in conjunction with the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides in pertinent 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). Information 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). Upon review, we find you have failed to demonstrate how any of the submitted information constitutes a communication between a physician and a patient or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician for purposes of the MPA. Accordingly, no portion of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

You also raise section 552.101 of the Government Code in conjunction with section 181.101 of the Health and Safety Code. Section 181.101 provides “[a] covered entity shall comply with the Health Insurance Portability and Accountability Act and Privacy Standards relating to . . . (3) uses and disclosures of protected health information, including requirements relating to consent[.]” Health & Safety Code § 181.101(3). However, section 181.101 was repealed effective September 1, 2003. Act of June 17, 2001, 77th Leg., R.S., ch. 1511, § 1, sec. 181.101, 2001 Tex. Gen. Laws 5384, 5386, *repealed by* Act of April 10, 2003, 78th Leg., R.S., ch. 3, § 1, 2003 Tex. Gen. Laws 5. Thus, we conclude the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 181.101 of the Health and Safety Code.

Section 552.101 also encompasses information made confidential by federal law. This office has 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), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as a taxpayer’s “identity, the nature, source, or amount of income.” *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). Consequently, the city must withhold the W-4 form we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.¹

Section 552.101 also encompasses section 1324a of title 8 of the United States Code. This section provides that an Employment Eligibility Verification I-9 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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The remaining information contains an I-9 form. Release of this document in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we find the submitted I-9 form, which we have marked, is confidential under section 1324a of title 8 of the United States Code and must

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

only be released in compliance with the federal laws and regulations governing the employment verification system.²

Section 552.101 also encompasses information protected by common-law privacy. Section 552.102 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 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 your section 552.101 and 552.102 privacy claims together.

Common-law privacy protects information that (1) contains highly intimate or embarrassing facts about a person's private affairs, such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). The type of information considered intimate or 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. Additionally, this office has also 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. See 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 pre-tax 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). However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under 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), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find a portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern. Therefore, this information protected under common-law privacy. The city must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

privacy. However, we find the remaining information is either not intimate or embarrassing or is of legitimate public interest. Therefore, none of the remaining information is subject to common-law privacy, and it may not be withheld under section 552.101 in conjunction with common-law privacy or section 552.102.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former 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. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of 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). We note that section 552.117(a)(1) is not applicable to a former spouse or the fact that a governmental employee has been divorced. The submitted information demonstrates that the former city employee at issue elected to keep such information confidential prior to the receipt of this request. Therefore, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code.³

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Section 552.130 excepts from disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. *Id.* § 552.130. Accordingly, the city must withhold the Texas driver's license information we have marked under section 552.130 of the Government Code.

In summary, the city: (1) must withhold the W-4 form marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (2) must only release the marked I-9 form in compliance with the federal laws and regulations governing the employment verification system; (3) must withhold the information marked under section 552.101 of the Government Code in conjunction with common-law privacy; (4) must withhold the information marked under section 552.117(a)(1) of the Government Code; (5) must withhold the information marked under section 552.117(a)(2) of the Government Code; and (6) must withhold the Texas driver's license information marked under section 552.130 of the Government Code. The remaining information must be released.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/dls

Ref: ID# 344985

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)