



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 30, 2009

Mr. Miguel A. Saldaña
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103 East Price Road, Suite A
Brownsville, Texas 78521

OR2009-10547

Dear Mr. Saldaña:

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# 350645 (BISD PIR# 4725).

The Brownsville Independent School District (the "district"), which you represent, received a request for (1) all information related to a specified Equal Employment Opportunity Commission ("EEOC") charge, including information from the district's board meeting on March 3, 2009, and (2) the number of special education mediations from the 1990-91 school year through the 2008-09 school year. You indicate that the district does not maintain any information responsive to item (2).¹ You state that the district has released some information responsive to item (1). You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.²

¹We note the Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983)

²We note that you have redacted some student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or student consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Initially, we note that you have redacted some information that is not related to student records. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code § 552.301(a), (e)(1)(D). You do not assert, nor do our records indicate, that you have been authorized to withhold any of the redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, this type of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. Because we are unable to discern the nature of the redacted information, the district has failed to comply with section 552.301, and such information is presumed public under section 552.302. *See Gov't Code* §§ 552.301(e)(1)(D), .302. Thus, we conclude that the district must release the information you have redacted to the requestor. If you believe this information is confidential and may not lawfully be released, you must challenge this ruling in court. In the future, the district should refrain from redacting any information it submits to this office when seeking an open records ruling. We will consider your arguments against disclosure of the remaining information at issue.

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. You raise section 552.101 in conjunction with section 551.104 of the Government Code, which provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." Gov't Code § 551.104(c). Thus, a governmental body must not release such information to a member of the public in response to an open records request. *See Open Records Decision No. 495 at 4 (1988)*. Accordingly, the district must withhold any responsive certified agenda from or tape recording of a closed meeting of the district board pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.³

We note that section 552.101 also encompasses information made confidential by statute. 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)*. 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

³We note that the district is not required to submit a certified agenda or tape recording of a closed meeting to this office for review. *See ORD 495 at 4 (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to section 552.101)*.

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). Accordingly, the district must withhold the W-4 tax 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.

The submitted information also contains medical records, access to which is governed by the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in relevant 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). This office has concluded that, when a file is created as the result of a hospital stay, all the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. See Open Records Decision No. 546 (1990). When a patient is deceased, as is presently the case, medical records may be released only on the signed consent of the deceased’s personal representative. See Occ. Code § 159.005(a)(5). The consent in that instance must specify (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. See *id.* §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. See *id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the medical records that are subject to the MPA. The district may disclose these records only in accordance with the access provisions of the MPA. Absent the applicability of an MPA access provision, the district must withhold these records pursuant to the MPA. See Open Records Decision No. 598 (1991).

The submitted information also includes a document subject to the Americans with Disabilities Act (the “ADA”). 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. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The EEOC determined 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). Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). We have marked a document that is confidential under the ADA; the district must withhold this document under section 552.101 of the Government Code.

You also raise section 552.101 in conjunction with common-law privacy, which 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). However, the information you seek to withhold on this basis relates to a deceased person, and the right to privacy lapses upon death. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981). Thus, the district may not withhold any of the submitted information on the basis of the deceased person's common-law right to privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code.⁴ Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. The

⁴The 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).

submitted information contains social security numbers, addresses, telephone numbers, and family information related to multiple employees of the district, including a deceased person. Because the protection afforded by section 552.117 includes "current or former" officials or employees, the protection does not lapse at death, except with regard to the deceased's social security number. Accordingly, the district must withhold the information we have marked under section 552.117, to the extent the employees concerned timely elected under section 552.024 to keep such information confidential.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). *See id.* § 552.136(a) (defining "access device"). Therefore, the department must withhold the information we have marked pursuant to section 552.136 of the Government Code.

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 id.* § 552.137(a)-(c). The district must withhold the information we have marked under this exception.

The remaining information also contains two copies of a DD-214 military discharge form. Section 552.140 of the Government Code provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003, is confidential for a period of seventy-five years and may be disclosed only in accordance with section 552.140 or a court order. *See id.* § 552.140(a), (b). You do not inform us when the district came into possession of the submitted DD-214 form. Therefore, if the submitted DD-214 form came into the possession of the district on or after September 1, 2003, the district must withhold this form in its entirety under section 552.140. Conversely, if the district received the form before September 1, 2003, the district may not withhold the form pursuant to section 552.140.

Finally, we note that some of the submitted information is 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 copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, 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).

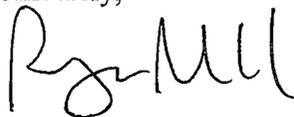
In summary, the district: (1) must withhold any responsive certified agenda from or tape recording of a closed meeting of the district board pursuant to section 552.101 of the

Government Code in conjunction with section 551.104(c) of the Government Code; (2) must withhold the W-4 tax 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; (3) may disclose the information we have marked under the MPA only in accordance with the access provisions of the MPA; (4) must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA; (5) must withhold the information we have marked under section 552.117 to the extent the employees concerned timely elected under section 552.024 to keep such information confidential; (6) must withhold the information we have marked pursuant to section 552.136 of the Government Code; (7) must withhold the information we have marked under section 552.137 of the Government Code; (8) must withhold the submitted DD-214 form under section 552.140, but only if the district first received this form before September 1, 2003; and (9) must release the remainder of the submitted information, but must comply with copyright law in so doing.

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,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/rl

Ref: ID# 350645

Enc. Submitted documents

cc: Requestor
(w/o enclosures)