



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 4, 2010

Ms. Myrna S. Reingold  
Staff Attorney  
Galveston County  
722 Moody, 5th Floor  
Galveston, Texas 77550-2317

OR2010-00039

Dear Ms. Reingold:

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# 366103.

The Galveston County District Clerk, the Galveston County Human Resource Department, and the Galveston County Legal Department (collectively the "county") each received a request for information pertaining to a named individual. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, 552.136, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you acknowledge that for a portion of the submitted information, the county failed to meet the deadlines prescribed by section 552.301 of the Government Code. *See Gov't Code* § 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at

stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). We note that you raise sections 552.101, 552.102, 552.117, 552.130, 552.136, and 552.137 of the Government Code for the untimely submitted information. Because these exceptions can provide compelling reasons to withhold information under the Act, we will address your arguments under these exceptions for the untimely submitted information. We will also address these arguments for the timely submitted information.

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. This section encompasses information protected by other statutes. You contend that a portion of the submitted information pertaining to the Texas County and District Retirement System (the "system") is confidential under section 845.115 of the Government Code. Section 845.115 of the Government Code provides in relevant part:

(a) Information contained in records in the custody of the retirement system or maintained in the custody of another governmental entity or an administrator or carrier acting in cooperation with or on behalf of the retirement system concerning a participant is confidential. Except as otherwise provided by this section, the retirement system is not required to accept or comply with a request for a record or information about a record of a participant or to seek an opinion from the attorney general because the records of a participant are exempt from the public information provisions of Chapter 552 [of the Government Code]. The information may not be disclosed in a form identifiable with a specific individual unless:

(1) the information is disclosed to:

(A) the participant or the participant's attorney, guardian, executor, administrator, conservator, or other person who the director determines is acting in the interest of the participant or the participant's estate;

(B) a spouse or former spouse of the participant and the director determines that the information is relevant to the spouse's or former spouse's interest in member accounts, benefits, or other amounts payable by the retirement system;

(C) a governmental official or employee and the director determines that disclosure of the information requested is reasonably necessary to the performance of the duties of the official or employee; or

(D) a person authorized by the participant in writing to receive the information; or

(2) the information is disclosed pursuant to a subpoena and the director determines that the participant will have a reasonable opportunity to contest the subpoena.

*Id.* § 845.115(a). Section 845.115 makes confidential records of a participant in the system's retirement program that are in the system's custody or maintained in the custody of another governmental entity or an administrator or carrier acting in cooperation with or on behalf of the system. *Id.* Participant is defined as "a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system." *See id.* §§ 845.114(a), 845.115(f). The information at issue consists of information obtained from the system concerning a retiree. You state the county obtains and maintains the information at issue only because it was acting on behalf of or in cooperation with the system. Based upon this representation, we find the county maintains the information at issue in cooperation with the system. Further, you indicate the county has not otherwise been authorized to release the information. *See id.* § 845.115(a). The requestor is not a person to whom disclosure is permitted under section 845.115. Accordingly, the information we have marked is confidential under section 845.115 of the Government Code and must be withheld in its entirety pursuant to section 552.101 of the Government Code.<sup>1</sup>

Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) 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 his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, 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 with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, 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). Consequently, the county must withhold the submitted W-4 forms 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 section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 "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

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

C.F.R. § 274a.2(b)(4). Release of the submitted I-9 forms under the Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we find the submitted I-9 form is confidential under section 552.101 of the Government Code, and may only be released in compliance with the federal laws and regulations governing the employment verification system.

The Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, is also encompassed by section 552.101. Section 159.002 of the MPA provides in part the following:

(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.

Occ. Code § 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 supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we agree that some of the remaining information, which we have marked, constitutes medical records that are subject to the MPA. However, you have failed to demonstrate how any of the remaining 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 the purposes of the MPA. Accordingly, the county must withhold only the medical records we have marked under the MPA.<sup>2</sup>

You claim a portion of the remaining information is subject to the Family Medical Leave Act (the “FMLA”), section 2654 of title 29 of the United States Code, which is also encompassed by section 552.101 of the Government 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

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<sup>2</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

(g) Records 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 the 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). We agree some of the remaining information, which we have marked, consists of a medical certification provided to the county for FMLA purposes. Thus, this information is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find that none of the release provisions of the FMLA apply to these records. Thus, we conclude that the county must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the FMLA.<sup>3</sup> However, upon review of the remaining information at issue, we find that you have failed to demonstrate that any of it 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 based on the FMLA.

Section 552.101 of the Government Code also encompasses the Americans with Disabilities Act (the "ADA"), which 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. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission determined medical information for the

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<sup>3</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

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). Upon review, we find the county has failed to demonstrate the ADA is applicable to any portion of the remaining information. Accordingly, the county may not withhold any of the remaining information under section 552.101 on that basis.

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 the county section 552.102 claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

Common-law privacy protects information that (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.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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. See *id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 545 (1990); and personal

financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and 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). We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions 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 (1990); 470 at 4 (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). Upon review, we find the information we have marked is intimate or embarrassing and not of legitimate public concern. Thus, the county must withhold the marked information under section 552.101 in conjunction with common-law privacy. However, because some of the remaining information pertains to workers' compensation claims, we find there is a legitimate public interest in this information. Furthermore, you have failed to demonstrate how any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, none of the remaining information is confidential under the doctrine of common-law privacy, and it may not be withheld under either section 552.101 or section 552.102 of the Government Code on that basis.

Section 552.117(a)(1) of the Government Code 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), .024. We note that a post office box number is not a "home address" for purposes of section 552.117.<sup>4</sup> We also note that section 552.117 encompasses a personal cellular telephone number, unless the service is paid for by a governmental body. *See* Open Records Decision Nos. 670 at 6 (2001), 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cell phone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, if the employees at issue timely elected to withhold personal information pursuant to section 552.024, then except where we have marked for release, the county must withhold the information you have marked, in addition

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<sup>4</sup>*See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)).

to the information we have marked, under section 552.117 of the Government Code.<sup>5</sup> The county may not withhold this information if the employees did not make timely elections to keep the information confidential.

Section 552.130 of the Government Code excepts from disclosure "information [that] relates to ... a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(1), (2). Accordingly, the county must withhold the Texas motor vehicle record information we have marked in the remaining information pursuant to section 552.130 of the Government Code.

Section 552.137 of the Government Code 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. *Id.* § 552.137(a)-(b). The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c). *See id.* § 552.137(c). Therefore, the county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. However, the remaining information you have marked consists of e-mail addresses excluded by section 552.137(c). Therefore, the county may not withhold any of the remaining information under section 552.137.

In summary, the county must withhold : (1) the information marked under section 845.115 of the Government Code in conjunction with section 552.101 of the Government Code; (2) the submitted W-4 forms pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (3) the submitted I-9 form under section 552.101 of the Government Code, unless release is in compliance with the federal laws and regulations governing the employment verification system; (4) the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the FMLA; (5) the marked information under sections 552.101 and 552.102 in conjunction with common-law privacy; (6) the marked information under section 552.117(a)(1) of the Government Code to the extent it pertains to current or former county employees who timely elected confidentiality, but must release the information we have marked; (7) the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code; and (8) the e-mail addresses we have marked

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<sup>5</sup>Regardless of the applicability of section 552.117, section 552.147(b) 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.

under section 552.137 of the Government Code.<sup>6</sup> The remaining information must be released.

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](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, toll free, at (888) 672-6787.

Sincerely,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/eb

Ref: ID# 366103

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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<sup>6</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: a direct deposit authorization form under section 552.101 in conjunction with the common-law right to privacy; a Form I-9 and attachments under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; W-4 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; a Texas driver's license number, and a copy of a Texas driver's license under section 552.130; and an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.