



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2010

Ms. Sheri Dye
Assistant Criminal District Attorney
Bexar County Criminal District Attorney's Office
300 Dolorosa, 4th Floor
San Antonio, Texas 78205

OR2010-08095

Dear Ms. Dye:

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# 381829.¹

The Bexar County Tax Assessor-Collector (the "tax-assessor") and the Bexar County Civil Service Commission (the "commission") (collectively, the "county") received two requests from the same requestor for the following information: (1) disciplinary suspensions issued to employees for specified violations during specified time frames; (2) employee manuals, general manuals, and standard operating procedures issued to employees assigned to the motor vehicle department and its subdivisions; and (3) the complete employment file of the requestor's client. You state the commission does not have or maintain the requested information.² You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.³ We have also considered

¹This office originally assigned identification numbers 381831 and 381829 to these requests for a ruling. These requests have been combined and are being issued as one ruling with the identification number noted above.

²We 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).

³We 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.

comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that a person may submit comments stating why information should or should not be released).

Initially, we note that the requestor has excluded social security numbers, driver's license numbers, addresses and telephone numbers from his request. Thus, this information is not responsive to the instant request. The county need not release such information and this ruling will not address it.

Next, we note that the submitted information reflects that some of the responsive information was previously released to the requestor. The Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to Gov't Code § 552.007). Although you seek to withhold the information at issue under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 neither expressly prohibits the release of information to the public nor makes information confidential under law. Therefore, to the extent the county has previously voluntarily released any of the submitted information to the public, it may not be withheld from the requestor under section 552.103.

The submitted information includes employee performance evaluations subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Although you seek to withhold the performance evaluations subject to section 552.022(a)(1) under section 552.103 of the Government Code, as noted above this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORD 665 at 2 n.5. As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the county may not withhold the performance evaluations, which we have marked, under section 552.103 of the Government Code. As you raise no other exception to disclosure for this information, the performance evaluations must be released.

Next, we will address your argument under section 552.103 of the Government Code for the remaining information. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You state the county anticipates litigation in this case. You explain that the requestor represents a former county employee who is currently appealing his termination in proceedings against the Bexar County Civil Service Commission. This office has held "litigation" within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987), 368 (1983), 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g.*, Open Records Decision Nos. 588 (1991) (proceeding of former State Board of Insurance), 301 (proceeding of Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has considered the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are resolved, d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588. You have not submitted any rules regarding the administrative proceeding at issue, nor provided us with evidence to show

that this proceeding is conducted in a quasi-judicial forum. Because the county has failed to show that the proceeding at issue constitutes litigation for purposes of section 552.103, the county may not withhold the remaining information under section 552.103.

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 information made confidential by statute, including medical records that are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in 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 determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Medical records must be released on receipt of 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. *See* Occ. Code §§ 159.004, .005. We have marked medical records, including medical records pertaining to the requestor's client, that are subject to the MPA. As the attorney for an individual whose medical records are at issue, the requestor may have a right of access to the submitted medical records pertaining to his client upon providing proper consent. Such records may only be released in accordance with the MPA. *See* ORD 598.

The remaining information includes a dental record, the public availability of which is governed by chapter 258 of the Occupations Code. Section 258.102 provides as follows:

(a) The following information is privileged and may not be disclosed except as provided by this article:

(1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and

(2) a dental record.

(b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

Occ. Code § 258.102. A “dental record” means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See id.* § 258.101(1). Information that is privileged under chapter 258 of the Occupations Code may be disclosed only under certain specified circumstances. *See id.* § 258.104 (consent to disclosure); *see also id.* §§ 258.105, .106, .107 (exceptions to privilege). The written consent for the release of privileged information required under section 258.104 must specify (1) the information covered by the release, (2) the person to whom the information is to be released, and (3) the purpose for the release. *See id.* § 258.104(c). A person who receives information that is privileged under section 258.102 of the Occupations Code may disclose that information to another person only to the extent that disclosure is consistent with the purpose for which the information was obtained. *See id.* § 258.108. We have marked the dental record that is privileged under section 258.102 of the Occupations Code and that may only be released in accordance with chapter 258 of the Occupations Code.

We note that portions of the remaining information are confidential pursuant to section 552.101 of the Government Code in conjunction with federal law. Section 552.101 encompasses the federal Family and Medical Leave Act (the “FMLA”). *See* 29 U.S.C. § 2801 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements pertaining to information that is subject to the FMLA. Subsection (g) of section 825.500 provides 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). We have marked information that is confidential under section 825.500 of title 29 of the Code of Federal Regulations. None of the release provisions of the FMLA appear to apply in this instance. Therefore, the marked information must be withheld pursuant to section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) renders tax return information confidential for purposes of section 552.101 of the Government Code. *See* 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).

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 that, 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). The remaining information includes a W-4 form of the requestor's client. Accordingly, pursuant to section 6103(c) of title 26 of the United States Code, the county must release the W-4 form, which we have marked, to the requestor if the Secretary of Treasury determines such disclosure would not seriously impair federal tax administration. Otherwise, the marked W-4 form is confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (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. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See 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. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex.

App.—El Paso 1992, writ denied), the court determined that the identity of a victim of alleged sexual harassment is protected by common-law privacy. *See id.* at 525. We have marked the identifying information of a victim of sexual harassment in the remaining information. The county must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

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). 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 have marked information that is subject to section 552.117(a)(1) and that must be withheld if the employee in question made a timely election for confidentiality of this information pursuant to section 552.024. If the employee in question did not make a timely election for confidentiality, then this information may not be withheld under section 552.117(a)(1) of the Government Code.

Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of this chapter, 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 also* § 552.136(a) (definition of “access device number” includes account numbers). The county must withhold the bank account and routing numbers we have marked pursuant to section 552.136 of the Government Code.⁴

In summary, the county may only release the marked medical records in accordance with the MPA and the marked dental record in accordance with chapter 258 of the Occupations Code. The county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with: the FMLA; section 6103 of title 26 of the United States Code, unless such disclosure would not seriously impair federal tax administration; and common-law privacy. The county must withhold the information we have marked under sections 552.117(a)(1) if the employee concerned elected confidentiality for this information. The county must withhold the information we have marked under section 552.136 of the Government Code. The remaining information must be released.⁵

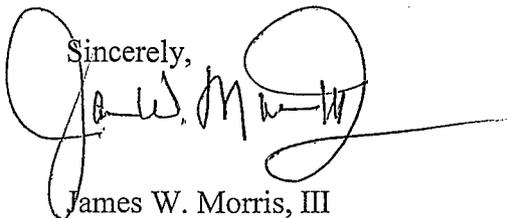
⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁵We note the requestor has a special right of access to some of the information being released in this instance. *See Gov't Code* § 552.023(a) (person or a person's authorized representative has a special right of access to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests). Therefore, the county must again seek a decision from this office if it receives another request for the same information from a different requestor.

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

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized with a large, looping initial "J" and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 381829

Enc. Submitted documents

c: Requestor
(w/o enclosures)