



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 22, 2011

Ms. Lisa Calem-Lindstrom  
Public Information Coordinator  
Texas Facilities Commission  
P.O. Box 13047  
Austin, Texas 78711-3047

OR2011-17249

Dear Ms. Calem-Lindstrom:

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# 437038.

The Texas Facilities Commission (the "commission") received a request from two requestors for all records pertaining to employees at the Governor's Mansion employed during a specified time period. You state you are withholding certain personal information of former employees subject to section 552.117 of the Government Code pursuant to section 552.024 of the Government Code,<sup>1</sup> certain information pursuant to Open Records Decision No. 684 (2009),<sup>2</sup> a driver's license number under section 552.130(a)(1) of the Government Code

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<sup>1</sup>Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). We note the submitted information includes election forms showing that the employees at issue elected to deny access to their home addresses and telephone numbers, social security numbers, and family member information prior to the commission receiving the present request for information. Although the election forms provide no means for the employees to request that their emergency contact information be withheld from disclosure under section 552.117(a)(1), we note the commission may withhold emergency contact information that consists of family member information.

<sup>2</sup>This office issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code, a direct

pursuant to section 552.130(c) of the Government Code,<sup>3</sup> and bank account and bank routing numbers under section 552.136(b) of the Government Code pursuant to section 552.136(c) of the Government Code.<sup>4</sup> You claim that portions of the remaining submitted information are excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your contention the request for information has been withdrawn by operation of law because the requestors failed to respond to the itemized cost estimate for copies of the requested information within ten business days. Under section 552.2615 of the Government Code, a governmental body is required to provide a requestor with an estimate of charges when a request to inspect a paper record will result in the imposition of a charge that will exceed forty dollars. *See* Gov't Code § 552.2615. The relevant portion of section 552.2615 provides:

(a) . . . If an alternative less costly method of viewing the records is available, the statement must include a notice that the requestor may contact the governmental body regarding the alternative method. The governmental body must inform the requestor of the responsibilities imposed on the requestor by this section and of the rights granted by this entire section and give the requestor the information needed to respond, including:

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deposit authorization form under section 552.101 of the Government Code in conjunction with the common-law right to privacy, and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>3</sup>Section 552.130(c) of the Government Code authorizes a governmental body to redact from the requested information it discloses, without the necessity of requesting a decision from this office, a motor vehicle operator's or driver's license or permit issued by an agency of this state, or another state or country, and a personal identification document issued by an agency of this state, or another state or country, or a local agency authorized to issue an identification document. Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(c)) (governmental body may redact information described by subsections 552.130(a)(1) and (3) from any information the governmental body discloses without necessity of requesting decision from attorney general); *see id.* (to be codified at Gov't Code § 552.130(d)) (entitling requestor to appeal governmental body's decision to withhold information pursuant to section 552.130(c) to attorney general); *id.* (to be codified at Gov't Code § 552.130(e)) (requiring governmental body that withholds information pursuant to section 552.130(c) to provide notice to requestor).

<sup>4</sup>Section 552.136(c) of the Government Code authorizes a governmental body to redact from the requested information it discloses, without the necessity of requesting a decision from this office, a credit card, debit card, charge card, or access device number. Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.136(c)) (governmental body may redact information described by subsection 552.136(b) from any information the governmental body discloses without necessity of requesting decision from attorney general); *see id.* (to be codified at Gov't Code § 552.136(d)) (entitling requestor to appeal governmental body's decision to withhold information pursuant to section 552.136(c) to attorney general); *id.* (to be codified at Gov't Code § 552.136(e)) (requiring governmental body that withholds information pursuant to section 552.136(c) to provide notice to requestor).

(1) that the requestor must provide the governmental body with a mailing, facsimile transmission, or electronic mail address to receive the itemized statement and that it is the requestor's choice which type of address to provide;

(2) that the request is considered automatically withdrawn if the requestor does not respond in writing to the itemized statement and any updated itemized statement in the time and manner required by this section; and

(3) that the requestor may respond to the statement by delivering the written response to the governmental body by mail, in person, by facsimile transmission if the governmental body is capable of receiving documents transmitted in that manner, or by electronic mail if the governmental body has an electronic mail address.

(b) A request . . . is considered to have been withdrawn by the requestor if the requestor does not respond in writing to the itemized statement by informing the governmental body within 10 business days after the date the statement is sent to the requestor that:

(1) the requestor will accept the estimated charges;

(2) the requestor is modifying the request in response to the itemized statement; or

(3) the requestor has sent to the attorney general a complaint alleging that the requestor has been overcharged for being provided with a copy of the public information.

*Id.* § 552.2615(a), (b). You provide documentation showing you provided the requestors with an itemized cost estimate for information responsive to the request. *See id.* §§ 552.2615(a), .263(f). You further inform us the requestors responded to the cost estimate after ten business days had passed and renewed the initial request for information. *See id.* § 552.2615(a)(2) (request automatically withdrawn if requestor does not respond to itemized estimate of charges in the time and manner required by this section). However, we have examined the cost estimate at issue and have determined it does not comply with the provisions of section 552.2615. Specifically, the estimate did not inform the requestors that inspection of the records would be a less costly method of obtaining the information. *See id.* § 552.2615(a). Accordingly, we conclude the requestors' public information request has not been withdrawn by operation of law, and we will address your arguments against disclosure of the submitted information.

Next, we note you have marked portions of the submitted information as being non-responsive to the request for information. Upon review, we agree this information is not responsive to the request. We further note some of the remaining information, which we have indicated, is not responsive to the request because it pertains to employees employed outside the time period specified in the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses information that other statutes make confidential, such as the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which makes medical records confidential. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in 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 that is 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). This office has determined 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 find the information we have marked constitutes medical records subject to the MPA. *See* ORD 598. Therefore, the commission may only release this information in accordance with the MPA.<sup>5</sup>

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts,

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. 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. 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 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), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common-law privacy protects assets and income source information). Further, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). However, this office also has found a legitimate public interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 542 at 5 (1990), 470 at 4 (public has legitimate interest in job qualifications and performance of public employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate concern to the public. The commission must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the commission has not demonstrated any of the remaining responsive information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.101 of the Government Code on that basis.

You also raise section 552.102 of the Government Code and assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at \*5 (Tex. Dec. 3, 2010). The supreme court then

considered the applicability of section 552.102 and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at \*10. Upon review, we have marked the information the commission must withhold under section 552.102(a) of the Government Code. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

We note the remaining information contains information subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). 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). As previously noted, the commission has provided election forms pertaining to the employees at issue. Accordingly, the commission must withhold the additional information we have marked under section 552.117(a)(1) of the Government Code.

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 another state or country[.]”<sup>6</sup> Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130(a)(1)). Upon review, we find the commission must withhold the information we have marked under section 552.130 of the Government Code.

In summary, the information we have marked may be released only in accordance with the MPA. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, section 552.102(a) of the Government Code, section 552.117(a) of the Government Code, and section 552.130 of the Government Code. The remaining responsive 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.

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<sup>6</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

A handwritten signature in black ink, appearing to read "Sarah Casterline", with a large, stylized flourish extending to the right.

Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/ag

Ref: ID# 437098

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)