



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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Ms. Shirley Thomas
Acting General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
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OR2012-06082

Dear Ms. Thomas:

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# 451806 (ORR No. 8810).

Dallas Area Rapid Transit ("DART") received a request for the personnel file of a deceased employee and all information related to his death. You claim the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code and that release of some of this information may implicate the privacy interests of the deceased individual's family. Accordingly, you state you notified the deceased individual's family members of this request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (providing interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the 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." *Id.* § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as 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 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 [Americans with

Disabilities Act (the “ADA”)], as amended, 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). Upon review, we find the information we have marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA apply to the information. Accordingly, we find information we have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with the FMLA.¹

Section 552.101 of the Government Code also encompasses the MPA, subtitle B of title 3 of the Occupations Code. *See* Occ. Code §§ 151.001-167.202. The MPA governs access to medical records and 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.

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

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). This office has concluded 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). Section 159.001 of the MPA defines “patient” as a person who consults with or is seen by a physician to receive medical care. *See* Occ. Code § 159.001(3). Under this definition, a deceased person cannot be a “patient” under section 159.002 of the MPA. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Thus, the MPA is applicable only to records relating to a person who was alive at the time of diagnosis, evaluation or treatment to which the records pertain.

Medical records must be released on the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004-.005. The medical records of a patient who is now deceased may only be released on the signed written consent of the decedent’s personal representative. *See id.* § 159.005(a)(5). 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 documents that constitute confidential medical records of the deceased employee. DART must withhold these records under section 552.101 of the Government Code in conjunction with the MPA, unless DART receives consent for release of the records that complies with sections 159.004 and 159.005 of the MPA.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Because the constitutional right to privacy is a personal right that lapses at death, it does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enters.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); Open Records Decision No. 272 (1981). However, the United States Supreme Court has determined surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat’l Archives & Records Admin. v. Favish*, 124 S. Ct. 1570 (2004). As noted above, you have notified the decedent’s family of their right to assert a privacy interest in the information at issue.

However, as of the date of this decision, we have received no correspondence from the surviving family members of the decedent. Thus, we have no basis for determining the family has a privacy interest in any of the submitted information. Further, we find no portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. We therefore conclude DART may not withhold any of the submitted information under section 552.101 in conjunction with constitutional privacy.

Section 552.101 also encompasses section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and "any information contained in or appended to such 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). Thus, DART must withhold the I-9 form we have marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. *See* 8 U.S.C. § 1324a(b)(1)(B)-(D); 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C).

We note the remaining information includes the deceased employee's W-4 tax form. Section 552.101 encompasses information protected by other statutes, including section 6103(a) of title 26 of the United States Code, which renders tax return information confidential. *See* 26 U.S.C. § 6103(a); *see also id.* § 6103(b) (defining "return information"); Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 form). 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 [.]" 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). Thus, the submitted W-4 is generally confidential under section 552.101 in conjunction with 26 U.S.C. § 6103(a).

However, section 6103(e) is an exception to the confidentiality provisions of section 6103(a) that provides for disclosure of tax return information to the taxpayer and certain other persons having a material interest in the information. *See* 26 U.S.C. § 6103(e)(3) (return of decedent shall be disclosed to next of kin with material interest that will be affected by return information); Rev. Rul. 2004-68, 2004-31 I.R.B. 118 (existence of material interest of next of kin as person affected by return information presumed); *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 5 U.S.C. § 552a(d)(1) to federal agency records concerning self). Further, tax return

information may be disclosed to any person authorized to receive or inspect a return of the taxpayer, so long as such disclosure would not seriously impair federal tax administration. *See* 26 U.S.C. § 6103(e)(7). The person requesting access to a return under section 6103(e)(3) must provide proof of the following: (1) relationship to the decedent; (2) the date and place of death, and state of decedent's residence; and (3) the material interest that will be affected. Rev. Rul. 2004-68, 2004-31 I.R.B. 118. Therefore, under sections 6103(e)(3) and 6103(e)(7), upon receipt of the required proof, DART must disclose the submitted return information to the requestor. Otherwise, the information at issue 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.

We note portions of the remaining information may be subject to section 552.117(a)(1) of the Government Code.² 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. *See* Gov't Code § 552.117(a)(1). In this instance, the information at issue pertains to a deceased DART employee. Because the protection afforded by section 552.117 includes "current or former" officials or employees, we note the protection generally does not lapse at death, as it is also intended to protect the privacy of the employee's family members. We note, however, because the protection of social security numbers under section 552.117 is intended solely to protect the privacy of the employee, it lapses at death. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."). 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 only be withheld under section 552.117(a)(1) 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. Accordingly, if the deceased employee whose personal information we have marked timely requested confidentiality under section 552.024, DART must withhold this information under section 552.117(a)(1) of the Government Code. However, if this individual did not timely elect to keep his personal information confidential, none of the remaining information we have marked may be withheld under section 552.117(a)(1).

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state or another state or country is excepted from public release. *See id.*

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

§ 552.130(a)(1)-(2). We note the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, motor vehicle record information that pertains solely to deceased individuals may not be withheld under section 552.130. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. Accordingly, DART must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, DART must withhold under section 552.101 of the Government Code: (1) the information we have marked in conjunction with the FMLA; (2) the medical records we have marked in conjunction with the MPA, unless DART receives consent for release of the records that complies with sections 159.004 and 159.005 of the MPA; (3) the I-9 form we have marked in conjunction with section 1324a of title 8 of the United States Code; and (4) the W-4 form we have marked in conjunction with section 6103(a) of title 26 of the United States Code; however, if the requestor provides the required proof, DART must release the W-4 form under sections 6103(e)(3) and 6103(e)(7). DART must also withhold the personal information we have marked under section 552.117(a)(1) of the Government Code, if the deceased employee whose personal information we have marked timely requested confidentiality under section 552.024 of the Government Code, and the motor vehicle record information we have marked under section 552.130 of the Government Code. DART must release the remaining 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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 451806

Enc. Submitted documents

c: Requestor
(w/o enclosures)