



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 7, 2012

Mr. S. Anthony Safi  
Mounce, Green, Myers, Safi, Paxson & Galatzan  
P.O. Box 1977  
El Paso, Texas 79999-1977

OR2012-08783

Dear Mr. Safi:

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# 455725 (EPISD ORR # 2012.75).

The El Paso Independent School District (the "district"), which you represent, received a request for a specified investigation file, information pertaining to specific incidents, information pertaining to a written salary statement for a named individual, and the named individual's personnel file. You state the district will release some of the requested information, which includes a final audit report. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.116, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, which we understand constitutes a representative sample.<sup>1</sup> We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we note some of the submitted information on the CD is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body,” unless it is “made confidential under [the Act] or other law[.]” *Id.* § 552.022(a)(3). The information on pages 551, 553, 554, 556, 559 through 561, and 565 of the submitted CD is information relating to the receipt of public funds by the district and includes copies of checks written to the district. Although you assert this information is excepted from disclosure under section 552.116, this section is discretionary and does not make information confidential under the Act. *See id.* § 552.116; Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 3-21, 23-26, 28-37 (providing for “confidentiality” of information under specified exceptions); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold the information we have indicated under section 552.116. However, we note some of the information that is subject to section 552.022 includes information that is subject to section 552.136 of the Government Code, which makes information confidential under the Act.<sup>2</sup> *See* Gov’t Code § 552.136 (providing for “confidentiality” of information under section 552.136). As such, we will address the applicability of section 552.136 to the information subject to section 552.022. We will also consider the exceptions you raise for the information that is not subject to section 552.022.

Section 552.116 of the Government Code provides the following:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital

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<sup>2</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).

district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

*Id.* § 552.116. You state the information on the submitted CD and the two draft audit reports consist of audit working papers that were prepared or maintained by the district in conducting an audit. You further explain the audit at issue was conducted by the district's internal auditor as authorized by section 11.170 of the Education Code and the district's board of trustees. *See* Educ. Code § 11.170 (providing district's board of trustees may select an internal auditor who reports directly to the board). Based on your representations and our review, we agree the information at issue consists of audit working papers for purposes of section 552.116. Accordingly, the district may withhold the information on the submitted CD that is not subject to section 552.022 and the two draft audit reports under section 552.116 of the Government Code.<sup>3</sup>

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, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code, which provides in pertinent 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.

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

Occ. Code § 159.002(b)-(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). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990). Upon review, we find the information we have marked constitutes a confidential medical record under the MPA and the district must withhold this information under section 552.101 of the Government Code.<sup>4</sup>

Section 552.101 of the Government Code also encompasses the common-law right of 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. *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 found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public 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 has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision 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), 470 at 4 (1987) (job performance does not generally constitute public employee’s private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee’s job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee’s resignation ordinarily not private). Additionally, this office has found that names, telephone numbers, and addresses are not excepted from public disclosure under common-law privacy. *See* ORD 455 at 7.

Upon review, we agree some of the information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district must withhold this information,

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments for this information.

which we have marked, pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.<sup>5</sup> However, we find you have failed to demonstrate that any of the remaining information you have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district may not withhold any of the remaining information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

You also claim portions of the remaining information are excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) 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). We understand you to 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 expressly 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.*, 354 S.W.3d 336 (Tex. 2010). The supreme court then considered the applicability of section 552.102, and has 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 347. Having carefully reviewed the submitted information, we find that none of the remaining information is excepted under section 552.102(a) and, therefore, none of it may be withheld on that basis.

Section 552.136 of the Government Code states, “Notwithstanding 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 id.* § 552.136(a) (defining “access device”). Upon review, we find the district must withhold the bank account and bank routing numbers we have marked on the printouts of pages 561 and 565 of the submitted CD under section 552.136 of the Government Code.

In summary, with the exception of pages 551, 553, 554, 556, 559 through 561, and 565 of the CD that are subject to section 552.022 of the Government Code, the district may withhold the information on the submitted CD and the two draft audit reports under section 552.116 of the Government Code. The district must withhold the medical record we marked under section 552.101 of the Government Code in conjunction with the MPA and the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the bank account and

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

bank routing numbers we have marked on the printouts of pages 561 and 565 of the submitted CD under section 552.136 of the Government Code. The district 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](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,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/ag

Ref: ID# 455725

Enc. Submitted documents

c: Requestor  
(w/o enclosures)