



January 30, 2001

Ms. Bertha Bailey Whatley  
Attorney  
Forth Worth Independent School District  
100 North University Drive  
Fort Worth, Texas 76107

OR2001-0347

Dear Ms. Whatley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143715.

The Forth Worth Independent School District (the “district”) received a request for five categories of information related to maternity leave taken by district employees within the last 10 years. You state that most of the requested information is public and will be released to the requestor, but claim that the names of employees who have been on maternity leave are excepted from disclosure under section 552.101 of the Government Code, in conjunction with two federal statutes, the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (the “ADA”), and the Family and Medical Leave Act, 29 U.S.C. § 2654 (the “FMLA”), as well as under common law privacy. We have considered the exception you claim and reviewed the submitted information.<sup>1</sup>

Initially, we note that chapter 552 of the Government Code does not require a governmental body to make available information which did not exist at the time the request was received. Open Records Decision No. 362 (1983); *see* Open Records Decision No. 452 (1986)

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<sup>1</sup>We assume that the “representative samples” of records submitted to this office are 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.

(document not within chapter 552's purview if it does not exist when governmental body receives a request for it). Nor is a governmental body required to prepare new information to respond to a request for information. Open Records Decision No. 605 (1992), 572 (1990), 416 (1984). However, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990) at 8. If the district holds information from which the requested information can be obtained, the district must provide that information to the requestor unless it is otherwise excepted from disclosure.

We note that you have submitted to this office as responsive to the request a sample "Leave of Absence/Exit Form" for a district employee, as well as a letter from the district to the employee setting forth the terms of her maternity leave. While neither is a responsive document in and of itself, it appears that both the letter and the leave of absence form contain information that is responsive to the request. We have marked the information in the sample documents that is not responsive to the request and is therefore not at issue here. This ruling only addresses your raised exceptions to disclosure of the responsive information.

Section 552.101 encompasses confidentiality provisions such as the FMLA. 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 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). While certain records related to a district employee's maternity leave may be confidential under the FMLA, such as the person's medical history, nowhere does

the FMLA or its regulations provide for the confidentiality of the identity of a person taking advantage of family or medical leave. Therefore, we are unable to conclude that the names alone of district employees who have taken maternity leave are confidential under that federal statute or its implementing regulations.

You also claim that the submitted information is confidential under the ADA. 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, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, 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 (the "EEOC") has determined that medical information for the 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 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) [a]ny 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) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h). Interpretive guidance to these provisions published by the EEOC states that "[o]ther conditions, such as pregnancy, that are not the result of a physiological disorder are not impairments." *See also Navarro Pomares v. Pfizer Corp.*, 97 F. Supp. 2d 208, 212 (D.C. P.R. 2000). Therefore, the fact that a woman is pregnant in and of itself does not make her disabled for purposes of the ADA.

However, we note that federal court decisions have found that certain complications relating to pregnancy can be considered impairments. *See, e.g., Gabriel v. City of Chicago*, 9 F.Supp.2d 974, 981 (N.D.Ill.1998) (back pain, stomach pain, swelling, and premature birth

are physical impairments).<sup>2</sup> But while it may be the case that certain district employees seeking maternity leave might have an associated condition that qualifies them as disabled for purposes of the ADA, we are unable to conclude that the requested information, consisting solely of the names of district employees who have taken maternity leave over the last 10 years, is in and of itself made confidential by the ADA.

You also argue that the requested information is excepted from disclosure because employees “should have a common law privacy interest in any medical condition that would necessitate a leave of absence.”<sup>3</sup> For information to be protected from public disclosure under the common law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. The Supreme Court also found that a teacher's claim for expenses of a pregnancy resulting from the failure of a contraceptive device would be considered to be intimate and embarrassing and of no legitimate public interest. *Id.*

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. Open Records Decision No. 455 at 4 (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. *Id.* 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.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

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<sup>2</sup>In this regard, we note that the district's maternity leave policy provides that its purpose is to “grant leave of absence to any employee who suffers disabilities caused by pregnancy, childbirth, or related medical conditions or who adopts a child.” We further note your argument that “the names of employees who have requested a leave of absence because of a disability related to childbirth are confidential under the [ADA].”

<sup>3</sup>You cite to section 552.131 of the Government Code as the basis for your privacy argument. There are four separate sections in the Public Information Act numbered as section 552.131. None of them provides for a common law right of privacy. Such privacy interests are recognized under section 552.101, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Therefore, we will address your common law privacy argument under section 552.101.

Here, the only information at issue is the names of individuals who have been on maternity leave over a given time period. We do not believe this information, by itself, is protected by common law or constitutional privacy.

To summarize, we conclude that the names of all district employees who have been on maternity leave within the last 10 years are not protected by either the ADA, the FMLA, common law privacy, or constitutional privacy. Therefore, these names are not excepted from disclosure under section 552.101 of the Government Code, and must be released to the requestor. The district should redact unresponsive information from the submitted documents prior to releasing the documents. We have marked the information to be redacted.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 143715

Encl. Submitted documents

cc: Ms. Peggy Buttner  
Associate Director  
United Educators Association  
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(w/o enclosures)