



March 22, 2001

Ms. Alejandra I. Villarreal
Wickliff & Hall, P.C.
Alamo National Plaza
105 South St. Mary's Street, Suite 700
San Antonio, Texas 78205

OR2001-1133

Dear Ms. Villarreal:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145203.

The San Antonio Water System (the "system"), which you represent, received a request for information relating to a sexual harassment investigation, personnel files, and other information relating to a specified employee as well as system policies. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.130 of the Government Code. We assume that you have released the remaining responsive information. *See Gov't Code §§ 552.301, .302.* We have considered the exception you claim and reviewed the submitted information and representative samples.¹

You contend that the submitted information in Exhibit C is excepted under section 552.101 in conjunction with common law privacy. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert.*

¹In reaching our conclusion here, we 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.

denied, 430 U.S. 931 (1977). The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.*

The court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In conclusion, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Based on *Ellen*, a governmental body must withhold the identities of alleged victims and witnesses to alleged sexual harassment as well as any information which would tend to identify a witness or victim. You state that you have previously provided the requestor a copy of the summary of the sexual harassment allegations which you have provided to this office. Because the summary is analogous to the summary released in *Ellen*, we conclude that you must withhold the submitted information in Exhibit C under section 552.101 in conjunction with common law privacy.² You must also withhold the identity of the victim or any witnesses to the alleged sexual harassment in the summary.

Next, you contend that the submitted information in Exhibit D is excepted under section 552.101 in conjunction with the Medical Practice Act (MPA), section 159.002(b) of the Occupations Code. Section 552.101 also encompasses information protected by statute. Section 159.002(b) provides the following:

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.

Thus, access to medical records is governed by provisions outside the Public Information Act. *See* Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. Occ. Code §§ 159.002, .003. Medical records may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). After reviewing the submitted information, we agree that the system must withhold the information in Exhibit D under section 552.101 and the MPA.

²We note that you inform this office that you do not seek to withhold the newsletter in Exhibit C.

You also contend that the information in Exhibit E contains personal financial information that should be withheld under common law privacy. Prior decisions of this office have found that financial information relating to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 545 (1990), 373 (1983). A public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common law right of privacy. Open Records Decision No. 545 (deferred compensation plan). Information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. Open Records Decision No. 600 at 10 (1992). For example, this office has held that an employee's participation in the Texas Municipal Retirement System or in a group insurance plan funded by the governmental body is not excepted from disclosure under common law privacy. *Id.*; Open Records Decision No. 480 (1987). We have marked for release a document in Exhibit E which shows participation in the Texas Municipal Retirement System. We note, however, that the designation of a retirement beneficiary is protected from disclosure under section 552.101. Open Records Decision No. 600 (1992).

The employee's optional coverages will generally be funded by the employee and not the state. An employee's decision to enroll for optional coverages is a personal financial decision to allocate part of his compensation to optional benefits, and, therefore, the related information is excepted from disclosure by a right of privacy. Having reviewed the submitted information in Exhibit E, it does not appear that the information pertains to optional coverages and voluntary payroll deductions. If the system partly funds the employee's insurance, the information is not protected under common law privacy and may not be withheld on that basis. We have marked the information in Exhibit E which you must release.

Exhibit E also contains a W-4 Form. Title 26 section 6103(a) of the United States Code renders tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. 26 U.S.C. 6103(b)(2). This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989). Our office has specifically held that W-4 Forms must be withheld in their entirety. Open Records Decision No. 600 at 9 (1992). Therefore, you must withhold the submitted W-4 Form in Exhibit E.

With regard to Exhibit F, you contend that the social security numbers, home addresses, home telephone numbers, and family member information of the employee must be withheld under section 552.117(1) of the Government Code. Section 552.117(1) excepts from disclosure information that relates to the home addresses, home telephone numbers, social security numbers and family member information of current or former employees of a

governmental body. Section 552.117(1) information must be withheld only if the employee elected to keep this information confidential pursuant to section 552.024 prior to the date on which the commission received the request. *See* Open Records Decision No. 622 (1994) (providing that election must be made prior to date request received for each piece of information). The submitted information contains an election form in which the employee elected to withhold his home telephone number and home address. However, you have not submitted any evidence that the employee filled out an election form to withhold his family member information and his social security number. In order to withhold information under section 552.117(1), the employee must have elected to withhold each piece of information prior to the date of receipt of the request. Because the employee only elected to withhold his home address and telephone number, you may not withhold the employee's family member information or social security number. However, you must withhold the employee's home address and telephone number under section 552.117(1) of the Government Code. You must release the remaining information in Exhibit F.

However, social security numbers may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* However, it is not apparent to us that the social security numbers were obtained or maintained by the system pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the system to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution the system, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Gov't Code § 552.352. Prior to releasing the social security numbers, the system should ensure that these numbers were not obtained or maintained by the system pursuant to any provision of law enacted on or after October 1, 1990.

You contend that information in Exhibit G is excepted under section 552.130 of the Government Code. Section 552.130(a) 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 a motor vehicle title or registration issued by an agency of this state. Therefore, you must withhold all the driver's license information under section 552.130(a) of the Government Code.

In conclusion, you must withhold Exhibit C under section 552.101 in conjunction with common law privacy. You must also withhold medical records in Exhibit D under section 552.101 in conjunction with the MPA and the W-4 form in Exhibit E pursuant to federal law. Further, you must withhold the employee's home address and home telephone

number in Exhibit F under section 552.117(1) of the Government Code and driver's license information in Exhibit G under section 552.130 of the Government Code. Social security numbers may be excepted under federal law. You must release the remaining information.

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).

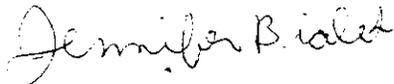
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/seg

Ref: ID# 145203

Encl: Submitted documents

cc: Ms. Connie Porras
National Alliance of Public Employees
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(w/o enclosures)