



August 29, 2001

Ms. Sara Shiplet Waitt  
Senior Associate Commissioner  
Legal and Compliance Division  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2001-3832

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151343.

The Texas Department of Insurance ("TDI") received a request for three categories of information, two involving extended sick leave or catastrophic illness leave, and the other involving salary and merit pay increases and promotions.<sup>1</sup> You inform us that you are prepared to release portions of the requested information. We assume that you have done so. Gov't Code §§ 552.301, .302. You have submitted a representative sample of the remaining information,<sup>2</sup> and you claim that the information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>The requestor seeks 1) a listing of all individuals who have applied for Extended Sick Leave or Extended Leave for Catastrophic Illness, including individuals previously and currently employed with TDI and the State Fire Marshall's Office ("SFMO") during the past six years; 2) the criteria used in order to make the decision to grant the leave, including documents or statements submitted by doctors or health care providers justifying the need for such leave; and 3) a list reflecting all salary increases, merit increases, and promotions for SFMO employees during the past three years.

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the records TDI seeks to withhold from public disclosure. *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.

You assert that information responsive to the request for statements from doctors or health care providers used in justifying the granting of leave is excepted from public disclosure. Access to medical records is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides:

(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.

The medical records may be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). After a review of your contention and the records at issue, we conclude that they are medical records subject to the MPA, and may be released only in accordance with the MPA.

You assert that information responsive to item 1 is excepted from public disclosure under section 552.101 of the Government Code and the common law right of privacy. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. 540 S.W.2d at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

You contend that, by their terms, extended sick or catastrophic illness leave involve a serious health condition of the employee or a member of the employee's family. You further contend that a list of names of TDI and SFMO employees who have applied for extended sick or catastrophic illness leave, as well as the identity of the person who is the subject of certain forms for leave request, meets the common law privacy test. After reviewing your argument and the submitted information, we conclude that the list of applicants for extended sick or catastrophic leave is not private under the *Industrial Foundation* test. Thus, the list is not excepted from disclosure under section 552.101. See Open Records Decision No. 470 at 4 (1987) (Although fact that public employee is sick is public, specific information about illnesses is excepted from disclosure under section 552.101). See also Open Records Decision Nos. 336 (1982), 262 (1980).

In summary, the department must not release documents or statements from doctors or health care providers justifying the need for extended sick or catastrophic illness leave except in accordance with the MPA. The department must release the remaining information to the requestor.

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).

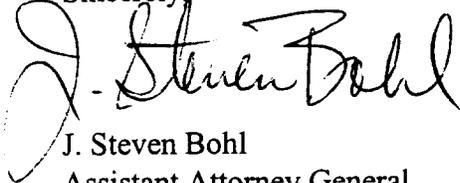
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



J. Steven Bohl  
Assistant Attorney General  
Open Records Division

JSB/sdk

Ref: ID# 151343

Enc: Submitted documents

c: Ms. Jacqueline Davis  
1720 Wells Branch Parkway, #4202  
Austin, Texas 78728  
(w/o enclosures)