



February 28, 2002

Ms. Marianna M. McGowan
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2002-0992

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159145.

The Plano Independent School District (the "district"), which you represent, received a request for copies of various documents pertaining to Plano Senior High School. You state that you have made some responsive information available to the requestor. You claim, however, that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that the information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code.¹ Section 402.083 provides that "[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this subtitle." Section 402.085 provides that the commission may release claim file information to certain third parties. *See* Labor Code § 402.085(a), (b). You state that the district self-administers its workers' compensation program and that it received the information from district employees. Therefore, since the district did not receive the information from the Texas Workers' Compensation Commission, it is not confidential

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

pursuant to section 402.083 of the Labor Code. See Labor Code §§ 402.083(a), .085; see also Open Records Decision No. 533 at 4 (1989). Accordingly, we conclude that the district may not withhold any portion of the information from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code.

You also claim that portions of the information constitute medical records, access to which is governed by the Medical Practice Act (the "MPA"), subtitle B of Title 3 of the Occupations Code. The MPA provides that "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." Occupations Code § 159.002(b). This office has concluded 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). 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. See Open Records Decision No. 565 at 7 (1990). We have marked the medical records that may only be disclosed in accordance with the access provisions of the MPA. See Occ. Code § 159.005(a)(5), (b); see also Open Records Decision Nos. 598 (1991), 546 (1990) (finding that because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, the district must withhold these medical records from disclosure pursuant to section 552.101 of the Government Code in conjunction with the MPA.

You also claim that the information is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Accordingly, we address your section 552.101 and 552.102 claims together.

Information is protected from disclosure by the common-law right to privacy 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. See *id.* This office has long held that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure pursuant to the common-law right to privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 at 5 (1987) (prescription drugs, illnesses,

operations, and physical handicaps). Based on our review of your arguments and the information, we conclude that the district must withhold from disclosure the information that we have marked and the audiotapes in their entirety pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also claim that portions of the information are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, 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(1)*. However, information subject to section 552.117(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Accordingly, the district must withhold the information that we have marked from disclosure pursuant to section 552.117(1), if the subject employees requested that this information be kept confidential under section 552.024 prior to the district's receipt of this request for information. Otherwise, the district must release this information to the requestor.

Nevertheless, if the subject employees did not elect to withhold their social security numbers from disclosure as prescribed by section 552.024, these numbers may still be confidential under federal law. A social security number or "related record" 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.* You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I). We caution the district, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers at issue, the district should ensure that the numbers were not obtained or are not maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

Finally, we note that the information contains a driver's license number that we have marked. Section 552.130 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. *See Gov't Code § 552.130*. We are unclear as to whether this number is a Texas driver's license number.

If the driver's license number that we have marked was issued by the State of Texas, the district must withhold it from disclosure pursuant to section 552.130 of the Government Code. Otherwise, the district must release it to the requestor.

In summary, absent the applicability of an MPA access provision, the district must withhold the marked medical records from disclosure pursuant to section 552.101 of the Government Code in conjunction with the MPA. The district must withhold from disclosure the information that we have marked and the audiotapes in their entirety pursuant to section 552.101 in conjunction with the common-law right to privacy. The district must withhold the information that we have marked from disclosure pursuant to section 552.117(1), if the subject employees requested that this information be kept confidential under section 552.024 prior to the district's receipt of this request for information. Otherwise, the district must release this information to the requestor. Nevertheless, the social security numbers of these employees may be confidential under federal law. If the driver's license number that we have marked was issued by the State of Texas, the district must withhold it from disclosure pursuant to section 552.130 of the Government Code. Otherwise, the district must release it. The district must also 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.

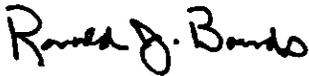
The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 159145

Enc. Marked documents

cc: Mr. Steven R. Dunn
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(w/o enclosures)