



March 1, 2002

Mr. Steven M. Kean  
Senior Assistant City Attorney  
City of Tyler - Legal Department  
P.O. Box 2039  
Tyler, Texas 75710

OR2002-0997

Dear Mr. Kean:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159363.

The City of Tyler Staff Services Department (the "department") received a request for copies of particular employment and income information pertaining to a specified City of Tyler employee. You state that some responsive information will be released to the requestor. You claim, however, that portions of the submitted information are excepted from disclosure pursuant to sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.<sup>1</sup>

Initially, we note that some of the submitted documents 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

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<sup>1</sup> 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.

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). Absent the applicability of an MPA access provision, the department must withhold these medical records from disclosure pursuant to section 552.101 of the Government Code in conjunction with the MPA.<sup>2</sup>

You claim that portions of the information are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses the common-law right to privacy. Information is protected by the common-law right of 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 *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); see also Open Records Decision No. 611 at 1 (1992). Prior decisions of this office have found that financial information relating only 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. See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. See Open Records Decision Nos. 600 (1992) (finding designation of beneficiary of employee's retirement benefits and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care related to personal financial decisions). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. See Open Records Decision No. 600 at 10 (1992).

After examining the information, it is not apparent whether the employee's deductions are mandatory or voluntary. Therefore, we caution the department to evaluate the information carefully before releasing it. See Gov't Code § 552.352. To the extent that these deductions are voluntary, the department must withhold this information from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. However, to the extent that these deductions are mandatory, we conclude that the

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<sup>2</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. Section 552.101 encompasses information protected by other statutes.

department must release this information to the requestor. We have, however, marked other personal financial information that the department must withhold from disclosure pursuant to section 552.101 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)*.

You have submitted to our office a form that reflects that the specified employee requested, prior to the department's receipt of the request for information, that information pertaining to his home address, home telephone number, and social security number, as well as information reflecting whether he had family members, be kept confidential. Accordingly, we conclude that the department must withhold the information that we have marked from disclosure pursuant to section 552.117(1) of the Government Code.

We also note that portions of the information contain account numbers that are subject to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides, in pertinent part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) 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. Accordingly, the department must withhold from disclosure the account numbers that we have marked pursuant to section 552.136 of the Government Code.

In summary, absent the applicability of an MPA access provision, the department must withhold the marked medical records from disclosure pursuant to section 552.101 of the Government Code in conjunction with the MPA. To the extent that the employee's deductions are voluntary, the department must withhold this information from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. However, to the extent that these deductions are mandatory, the department must release this information to the requestor. The department must withhold from disclosure other personal financial information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy. The department must withhold the information that we have marked from disclosure pursuant to section 552.117(1) of the Government Code. The department must withhold from disclosure the account numbers that we have marked pursuant to section 552.136 of the Government Code. 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 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# 159363

Enc. Marked documents

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(w/o enclosures)