



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 20, 2003

Mr. Lance Beversdorff
Staff Attorney
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2003-1930

Dear Mr. Beversdorff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178125.

The Texas Youth Commission (the "commission") received a request for the personnel file of an employee of the commission. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). In this case, the release of the submitted Form I-9 would be "for purposes other than for enforcement" of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the Form I-9 that we have marked must be withheld from disclosure under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

A W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26

U.S.C. § 6103(b)(2). We have marked a W-4 form that the commission must withhold under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, 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. 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 or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal 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). We have marked information that the commission must withhold under section 552.101 of the Government Code in conjunction with the ADA.

Some of the submitted information may be confidential under section 611.002 of the Health and Safety Code. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in part:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the submitted information that may be confidential under section 611.002. You do not indicate, however, and we are not otherwise able to ascertain whether the marked information was created or is maintained by a professional, as defined by section 611.001. Nevertheless, if the marked information was created or is maintained by a professional, then the commission must withhold that

information under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code, unless the requestor has a right of access to the marked information under sections 611.004 and 611.0045.

The submitted documents also contain information that is encompassed by the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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.

Id. § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). Medical records must 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. *See* Occ. Code §§ 159.004, .005. Furthermore, section 159.002(c) 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). Medical records may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991). We have marked the submitted information that is governed by the MPA. The commission must not release that information unless the MPA permits the commission to do so.

Section 552.101 of the Government Code also encompasses the common-law right of privacy. Common-law privacy under section 552.101 protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.102 of the Government Code, which you also raise, 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). Section 552.102(a) is applicable to information that relates to public officials and employees. The test of privacy under section 552.102(a) is the same as the common-law privacy test under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.). Therefore, we will address your privacy claim under section 552.101. In prior decisions, this office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990), 523 at 4 (1989), 373 at 4 (1983). Thus, a public employee’s allocation of part of the employee’s salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (TexFlex benefits), 545 at 3-5 (1990) (deferred compensation plan). Likewise, an employee’s designation of a retirement beneficiary is excepted from disclosure under the common-law right to privacy. *See* Open Records Decision No. 600 at 9 (1992). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state, and the basic facts about that transaction are not protected by common-law privacy. *Id.* at 9. Likewise, information relating to a pay leveling election is a basic fact about a transaction with a governmental body and thus is not private under section 552.101. *Id.* at 10-11. We have marked the types of personal financial information that the commission must withhold under section 552.101 of the Government Code in conjunction with common-law privacy, provided that the information does not relate to an employee benefit or other transaction that is funded in whole or in part by the commission.

The submitted documents also contain information that the commission may be required to withhold under section 552.117(1) of the Government Code. Section 552.117(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(1) must be determined at the time that the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the commission may only withhold information under section 552.117(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the commission received the request for information. The commission may not withhold information under section 552.117(1) in the case of a current or former employee who did not make a timely election to keep the information confidential. You inform us that the employee to whom the submitted information pertains has elected to allow public access to her section 552.117(1) information. The submitted information indicates, however, that the employee may have elected under section 552.024 to keep her section 552.117(1) information confidential. We therefore conclude that, to the extent that the employee timely and specifically elected

to keep her home address, home telephone number, social security number, and family member information confidential, the commission must withhold those types of information under section 552.117(1). We have marked the types of information that the commission may be required to withhold.

A social security number also may be excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number contained in the submitted documents is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the commission to obtain or maintain a social security number. Thus, we have no basis for concluding that any social security number contained in the submitted documents was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution the commission, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the commission should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

You also raise section 552.122(b) of the Government Code, which excepts from disclosure "a test item developed by a . . . governmental body[.]" In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994). In this instance, you seek to withhold answer keys for interview questions that are utilized in making hiring decisions. Based on your representations and our review of the information at issue, we have marked the information that qualifies as test items and thus is excepted from disclosure under section 552.122.

Lastly, 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[.]" Gov't Code § 552.130(a)(1). We have marked Texas driver's license information that you must withhold under section 552.130.

In summary, the commission must withhold some of the submitted information under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; section 6103(a) of title 26 of the United States Code; the Americans with Disabilities Act of 1990; and common-law privacy. The commission may be required to withhold other information under section 552.101 in conjunction with section 611.002 of the Health and Safety Code. The commission must not release the information that is governed by the MPA unless the MPA permits the commission to do so. The commission may be required to withhold the employee's home address, home telephone number, social security number, and family member information under section 552.117(1). A social security number may also be excepted from disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The commission may withhold the test item information under section 552.122. The commission must withhold the Texas driver's license information under section 552.130. The commission must release the rest of the requested 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).

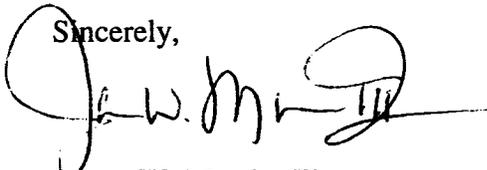
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 178125

Enc: Submitted documents

c: Mr. Clarence Kirven
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(w/o enclosures)