



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 1, 2003

Mr. Gary Grief
Acting Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2003-2208

Dear Mr. Grief:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178666.

The Texas Lottery Commission (the "commission") received a request for "all records, investigations, [and] findings" regarding the requestor's termination. You state that some information has been provided to the requestor but claim that other requested information is excepted from disclosure under sections 552.101, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

You argue that portions of the information submitted as Exhibit B are protected by the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* 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 section encompasses information made confidential by statute. Title I of the ADA 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. In addition, 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 job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The 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 agree that the information you have marked in Exhibit B must withheld under section 552.101 and the ADA.

You assert that portions of Exhibit C are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024. Therefore, the commission must withhold the listed information of any employee who elected, prior to the commission’s receipt of this request, to keep such information confidential. *See* Open Records Decision No. 530 at 5 (1989) (whether particular information is protected by predecessor to section 552.117(1) must be determined at time request for it is made). Because information is excepted under section 552.117 only to protect the privacy interests of employees and their families, the requestor has a special right of access to information concerning him. *See* Gov’t Code § 552.023 (governmental body may not deny access to information to person to whom information relates on grounds that information is considered confidential solely on the basis of privacy).

We note that, even if not protected under section 552.117, social security numbers may nevertheless be excepted from disclosure under section 552.101 in conjunction with federal law. The 1990 amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), 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* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act (the “Act”) imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, the commission should ensure that such information is not obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990. However, because the laws regarding the confidentiality of social security numbers are intended to protect individuals’ privacy, the requestor has a special right of access to his own social security number. *See* Gov’t Code § 552.023(b).

You also contend that certain information contained in Exhibit D is excepted from disclosure under section 552.137 of the Government Code. This section provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act].” You inform us that the individuals at issue have not affirmatively consented to

release of their e-mail addresses. Therefore, the commission must withhold the e-mail addresses we have marked. *See* Gov't Code § 552.137(b).

Finally, we note that a portion of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the marked information in Exhibit B must be withheld in accordance with section 552.101 and the ADA. Pursuant to section 552.117, the commission must withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees who elected, prior to the commission's receipt of this request, to keep such information confidential. In addition, social security numbers obtained or maintained pursuant to a law enacted on or after October 1, 1990 must be withheld under section 552.101 in conjunction with federal law. However, pursuant to section 552.023, the requestor has a special right of access to his own social security number. We have marked e-mail addresses that must be withheld pursuant to section 552.137. All other submitted information must be released in accordance with applicable copyright laws.

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

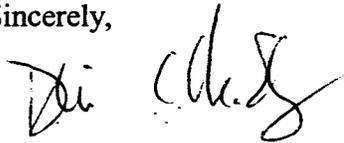
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 178666

Enc. Submitted documents

c: Mr. William Hensler
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Austin, Texas 78748
(w/o enclosures)