



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2005

Mr. Brendan Guy
Assistant County Attorney
Henderson County
100 East Tyler Street, Room 100
Athens, Texas 75751

OR2005-07465

Dear Mr. Guy:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 230705.

The Henderson County Sheriff's Office (the "county") received a request for "any and all employment records, files and memorandums, compensation, time and attendance records, personnel records, payroll and salary reports and all medical records" of a former county employee. You claim that the requested information is excepted from disclosure under section 552.102 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we must address the county's procedural obligations under section 552.301 of the Government Code. Subsections 552.301(a) and (b) provide as follows:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

¹We 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.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Gov't Code § 552.301(a), (b). You inform us that the county received the request for information on April 18, 2005. Based on this date, the tenth business day following the county's receipt of the written request was May 2, 2005. However, the information you have provided indicates that the county did not reply to the request until May 3, 2005, when the county asked the requestor to clarify her request. See Gov't Code § 552.222 (allowing governmental body to ask requestor to clarify or narrow request for information); Open Records Decision No. 663 at 2-5 (1999) (discussing requests to clarify or narrow request for information). Because the county did not seek clarification until after the tenth business day, the statutory period was not tolled for purposes of subsections 552.301(a) and (b). See Open Records Decision No. 663 at 5 (1999) (providing that time period is tolled during the clarification process). As such, we find that the county failed to comply with the procedural requirements of section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. See Open Records Decision No. 150 at 2 (1977). Because section 552.102 of the Government Code can provide a compelling reason to withhold information, we will address your claim regarding this exception.

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 v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code.² We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

²Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy.

In *Industrial Foundation*, the Texas Supreme Court held that information is protected by common-law privacy if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and 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. In this instance, however, the requestor works at a firm that is representing the former county employee who is the subject of the information at issue. Section 552.023 of the Government Code provides a person or a person's authorized representative with a special right of access to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect the person's privacy interests. We therefore conclude that the county may not withhold any of the submitted information on the basis of either section 552.102 of the Government Code or section 552.101 Government Code in conjunction with common-law privacy.

You also note that some of the submitted information may constitute medical records. Section 552.101 of the Government Code also encompasses information made confidential by other statutes. Medical records are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part as follows:

(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.

Occ. Code § 159.002(b), (c). Information that is subject to section 159.002 confidentiality includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical records must be released upon a 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).

Upon review, we agree that some of the submitted information constitutes a medical record that is subject to the MPA. Although the requestor has provided the county with a consent

form signed by the individual at issue, this office is unable to determine whether the requestor has authority to receive the submitted medical record. For your convenience, we have marked the medical record that may only be released in accordance with the MPA.

Next, we note the submitted pre-employment physical examination form is subject to the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that a covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, provided 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. 42 U.S.C. § 12112(d)(3)(B); *see also* 29 C.F.R. § 1630.14(b); Open Records Decision No. 641 (1996). Accordingly, we conclude that the county must withhold the pre-employment physical examination form, which we have marked, pursuant to section 552.101 in conjunction with the ADA.

Lastly, we note that the submitted information includes an L-2 Declaration of Medical Condition required by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). Chapter 1701 of the Occupations Code is applicable to TCLEOSE, and section 1701.306 of the Occupations Code makes confidential L-2 Declaration forms. Specifically, section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). Therefore, the county must withhold the submitted declaration that we have marked pursuant to section 552.101 in conjunction with section 1701.306 of the Occupations Code.

In summary, the county must withhold the L-2 Declaration and pre-employment physical examination form pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code and the ADA. The medical record we have marked may only be released in accordance with the MPA. The remaining submitted information must be released the requestor.³

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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

³Because some of the submitted information is confidential with respect to the general public, if the county receives a future request for this information from a person other than the requestor acting as a representative for the former employee or the former employee herself, the county should again seek our decision.

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,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 230705

Enc. Submitted documents

c: Ms. Sheryl Garrett
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(w/o enclosures)