



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 31, 2007

Ms. Ingrid K. Hansen  
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Texas Water Development Board  
P. O. Box 13231  
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OR2007-09682

Dear Ms. Hansen:

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# 285648.

The Texas Water Development Board (the "board") received a joint request from two requestors for seventy-one categories of personnel and training information; various investigations conducted during the past five years; as well as information related to grants, loans, and a specified work session. You state that the board will release some of the requested information, and that each requestor's personnel file will be released to her. You also state that the board will redact social security numbers from responsive records under section 552.147 of the Government Code.<sup>1</sup> You inform us that the board sought and received clarification from the requestor regarding items 24, 32, 40, and 46 of the request. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request). You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.130, 552.136,

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<sup>1</sup>Section 552.147 provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147(a). Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

and 552.137 of the Government Code.<sup>2</sup> You also indicate that some of the requested information is the subject of prior open records letter rulings. We have considered your arguments and have reviewed the submitted information, some of which consists of representative samples.<sup>3</sup> We have also considered comments submitted by the requestors. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

You state that some of the requested items are unclear, as the board "cannot possibly determine what documents may be used in the future in the event there is a negative personnel decision regarding the referenced employees." A governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). Although the board has requested further clarification regarding items 24, 32, 40, and 46 of the request, it appears that the board has made a good faith effort in this instance to relate the request to information in its possession. Thus, we will address the board's arguments for the submitted information.

You indicate that some of the requested information is the subject of Open Records Letter Nos. 2004-09871 (2004), 2005-02744 (2005), and 2006-11592 (2006). Provided that there has been no change in the law, facts, and circumstances on which the previous rulings are based, the board must dispose of any requested information that is encompassed by Open Records Letter Nos. 2004-09871, 2005-02744, and 2006-11592 in accordance with those rulings. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

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<sup>2</sup>Although the board did not timely raise sections 552.130 and 552.137, we consider its arguments under these sections because sections 552.130 and 552.137 can provide a compelling reason to withhold information. *See* Gov't Code §§ 552.301, .302. Further, while you raise section 552.024 of the Government Code, we note that section 552.024 is not an exception to public disclosure under chapter 552 of the Government Code. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See id.* § 552.024. Please note that section 552.117 of the Government Code is the proper exception to raise when arguing the confidentiality of such information. Although you also raise Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503 as potential exceptions to disclosure, the information for which you claim these privileges is not subject to section 552.022 of the Government Code. Therefore, these rules do not apply in this instance. *See* Open Records Decision No. 676 at 4 (2002). Finally, we note that while you raise sections 552.102, 552.103, and 552.111 of the Government Code as exceptions to disclosure, you have provided no arguments in support of these exceptions. Thus, we assume that you no longer urge them, and will not address the applicability of these exceptions. *See id.* §§ 552.301, .302.

<sup>3</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.

Next, we note that the Texas Comptroller of Public Accounts currently has a lawsuit pending against the Office of the Attorney General that pertains, in part, to individuals' dates of birth: *Tex. Comptroller of Public Accounts v. Abbott*, No. 03-07-00102-CV (Tex. App.—Austin, Feb. 13, 2007, n.w.h.). Accordingly, we do not address your arguments under section 552.101 with regard to the birth dates that the board seeks to withhold. We will allow the trial court to determine whether that type of information must be released to the public.

We also note that the submitted information includes college transcripts. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>4</sup> Consequently, education records that are responsive to a request for information under the Act should not be submitted to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information").

We note that the board is not an educational agency or institution for purposes of FERPA. In this instance, however, it appears that the board may have obtained one or more of the transcripts from the educational institutions that created the documents. FERPA contains provisions that govern access to education records that were transferred by an educational agency or institution to a third party. To the extent that the transcripts were obtained from an educational institution, so as to be governed by FERPA, we will not address the applicability of FERPA to the transcripts, because our office is prohibited from reviewing education records to determine whether appropriate redactions have been made under FERPA. Such determinations under FERPA must be made by the educational authorities from which education records were obtained. Thus, the board should contact any educational institution from which the transcripts were obtained, as well as the DOE, regarding the applicability of FERPA to the transcripts. To the extent that the transcripts are not governed by FERPA, we will address your arguments against their disclosure.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides the following:

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<sup>4</sup>A copy of this letter may be found on the Office of the Attorney General's website: [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

(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). 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. Occ. Code §§ 159.004, 159.005. 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). We have marked the medical records that are subject to the MPA. The board may only disclose these records in accordance with the access provisions of the MPA. Absent the applicability of an MPA access provision, the board must withhold these records pursuant to the MPA. *See* Open Records Decision No. 598 (1991).

Section 552.101 also encompasses the federal Family and Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). We have marked the information that is confidential under the FMLA, and must be withheld on this basis under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy), 545 (1990), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy); and identities of victims of sexual assault, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Upon review, we find that most of the information that you seek to withhold under this exception is protected under common-law privacy. We have marked some additional information that is private. However, you have failed to demonstrate how the information we have marked for release constitutes highly intimate or embarrassing information for the purposes of common-law privacy, and it may not be withheld under section 552.101 on that basis. Accordingly, except for the information we have marked for release, the board must withhold the private information you have highlighted in yellow and the additional information we have marked pursuant to section 552.101 of the Government Code.

You claim that Exhibits D, E, F, and G are attorney-client communications subject to section 552.107 of the Government Code. Section 552.107 protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a

governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You claim that the records at issue reveal or reflect confidential communications between the board and its attorneys. You state that the purpose of the communications was to facilitate the rendition of legal services. You also state that the confidentiality of the communications has been maintained. Based on your representations and our review of the submitted information, we agree that most of the submitted information constitutes confidential communications between privileged parties. Accordingly, Exhibits D, E, and G, and the information we have marked in Exhibit F may be withheld pursuant to section 552.107 of the Government Code. One of the submitted documents in Exhibit F, however, indicates that it has been disclosed to a third party. The board makes no assertion that the third party is a client, client representative, lawyer, or lawyer representative.

Accordingly, this document is not privileged and may not be withheld under section 552.107 on this basis.

You contend that some of the submitted information must be withheld under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current 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 request that this information be kept confidential under section 552.024. We note that section 552.117 also encompasses a personal cell telephone number, provided that the cell phone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). However, we note that a former spouse does not constitute a family member for purposes of section 552.117. Further, an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117.<sup>5</sup> Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You inform us, and provide supporting documentation showing, that some of the employees at issue elected to keep these types of information confidential before the board received the request for information. We note, however, that three of the employees at issue elected not to keep their home addresses and telephone numbers confidential. Thus, the board must withhold most of the information you have marked, as well the additional information we have marked, under section 552.117 of the Government Code. However, you have failed to demonstrate how the information we have marked for release is subject to section 552.117, and it may not be withheld from disclosure on that basis.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The board must withhold most of the Texas motor vehicle record information you have marked, as well as the additional information we have marked under section 552.130. However, you have failed to demonstrate how the information we have marked for release is subject to section 552.130, and it may not be withheld from disclosure on that basis.

You seek to withhold some of the remaining information under section 552.136 of the Government Code, which states that "[n]otwithstanding any other provision of this chapter,

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<sup>5</sup>*See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) ("The legislative history of section 552.117(1)(A) makes clear that its purpose is to protect public employees from being harassed *at home*. *See* House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985).") (Emphasis added.); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality).

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. We have marked the information that the board must withhold under section 552.136.

Finally, you claim that the highlighted e-mail addresses are excepted from public disclosure under section 552.137 of the Government Code. This section excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not of the type specifically excluded by section 552.137(c). Accordingly, unless the individuals whose e-mail addresses are at issue consented to release of their e-mail addresses, the board must withhold the highlighted e-mail addresses in accordance with section 552.137 of the Government Code. We have marked some additional information that must be withheld under section 552.137.

In summary, to the extent that the submitted educational transcripts were obtained from any educational institutions that created the transcripts, the board should contact the educational institutions and the DOE regarding the applicability of FERPA to the transcripts. The board must dispose of any requested information that is encompassed by Open Records Letter Nos. 2004-9871, 2005-02744, and 2006-11592 in accordance with those rulings. Absent the applicability of an MPA access provision, the board must withhold medical records pursuant to the MPA. We have marked the information that is confidential under the FMLA, and must be withheld on this basis under section 552.101 of the Government Code. Except for the information we have marked for release, the board must withhold the information you have highlighted in yellow and the additional information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. Exhibits D, E, and G, and the information we have marked in Exhibit F may be withheld pursuant to section 552.107 of the Government Code. Except for the information we have marked for release, the board must withhold the information you have marked, as well the additional information we have marked, under sections 552.117 and 552.130 of the Government Code. We have marked the information that the board must withhold under section 552.136 of the Government Code. Unless the individuals whose e-mail addresses are at issue consented to release of their e-mail addresses, the board must withhold the highlighted e-mail addresses and the additional information we have marked in accordance with section 552.137 of the Government Code. The remaining submitted information must be released to the requestors.<sup>6</sup>

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<sup>6</sup>Some of the documents marked for release contain or consist of confidential information that is not subject to release to the general public. See Gov’t Code § 552.352. However, each requestor in this instance has a special right of access to her own information. Gov’t Code § 552.023. Because some of the information is confidential with respect to the general public, if the board receives a future request for this information from an individual other than either requestor or her authorized representative, the board should again seek our decision.

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).

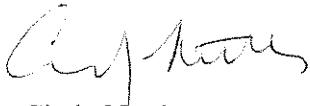
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 Office of the Attorney General 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. 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/mcf

Ref: ID# 285648

Enc. Submitted documents

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