



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 15, 2007

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P. O. Box 2000
Lubbock, Texas 79457

OR2007-10506

Dear Ms. Sims:

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# 287441.

The City of Lubbock (the "city") received two requests for information related to a recall petition filed with the city. You indicate that some responsive information has been released to one of the requestors. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the city may withhold the social security numbers contained in the submitted information under section 552.147.¹

Section 552.101 of the Government Code 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 information protected by other statutes. You claim that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs some of the submitted information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations

¹We note that section 552.147(b) of the Government Code 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. As section 552.147 is dispositive, we do not address your section 552.101 argument for this information.

setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the city may withhold protected health information from the public only if an exception in subchapter C of the Act applies.

You raise section 552.101 of the Government Code in conjunction with section 181.001 of the Health and Safety Code. Section 181.101 provides that “[a] covered entity shall comply with the Health Insurance Portability and Accountability Act and Privacy Standards relating to . . . (3) uses and disclosures of protected health information, including requirements relating to consent[.]” Health & Safety Code § 181.101(3). However, section 181.101 was repealed effective September 1, 2003. *See* Acts 2001, 77th Leg., R.S., ch. 1511, § 1, 2001 Tex. Gen. Laws 5384, *repealed by* Act of April 10, 2003, 78th Leg., R.S., ch. 3, 2003 Tex. Sess. Law Serv. 5. We therefore conclude that the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 181.101 of the Health and Safety Code.

You claim that “dates of birth [contained in the submitted records] may arguably be protected” under section 13.004(d) of the Election Code, which provides that the “voter registrar or other county official . . . may not post [a date of birth] on a website[.]” Elec. Code § 13.004(d)(4). For information to be confidential under section 552.101, the provision of law must explicitly require confidentiality. A confidentiality requirement will not be inferred from a provision’s structure. *See* Open Records Decision Nos. 658 at 4

(1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). Section 13.004(d) prohibits the posting of certain specified information on a website. *See* Elec. Code § 13.004(d). Because section 13.004(d) does not explicitly provide that information is confidential, we find that the city may not withhold any information from the requestor under section 552.101 of the Government Code in conjunction with section 13.004(d) of the Election Code.

We next address your claim that some of the submitted information is excepted from disclosure under section 552.102 of the Government Code. 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). This exception applies when the release of information would result in a violation of the common-law right to privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.). The common-law right to privacy is violated if the information (1) contains highly intimate or embarrassing facts about a person’s private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). 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); and personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990). We have reviewed the submitted documents and marked the information that is highly intimate or embarrassing and of no legitimate concern to the public. This marked information is confidential under the doctrine of common-law privacy and must be withheld under section 552.102 of the Government Code. We find, however, that the remaining information is either not intimate or embarrassing or is of a legitimate public interest. Therefore, none of the remaining information is confidential under the doctrine of common-law privacy, and it may not be withheld under section 552.102 on that basis.

You assert that the submitted information includes personal information belonging to city employees. Section 552.117(a)(1) of the Government Code 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 such information be kept confidential under section 552.024 of the Government Code. Additionally, section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular phone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with

section 552.024). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the personal information we have marked in the submitted information belongs to city employees who have made timely elections under section 552.024, this personal information must be withheld under section 552.117. To the extent this information does not belong to city employees who made a timely election under section 552.024 of the Government Code, it may not be withheld under section 552.117.

Finally, we note that section 552.130 of the Government Code is applicable to some of the submitted information. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). We have marked the type of information the city must withhold under section 552.130 of the Government Code.

In summary, the city may withhold the social security numbers contained in the submitted information under section 552.147. We have marked the information that is private and must be withheld under section 552.102 of the Government Code. To the extent the personal information we have marked in the submitted information belongs to city employees who have made timely elections under section 552.024 of the Government Code, this personal information must be withheld under section 552.117 of the Government Code. We have marked the type of information the city must withhold under section 552.130 of the Government Code. The remaining submitted information must be released.

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# 287441

Enc. Submitted documents

c: Ms. Kay Boren
Assistant News Director
KJTV Fox 34
9800 South University
Lubbock, Texas 79423
(w/o enclosures)

Ms. Cecelia Jones
KCBD 11
P.O. Box 2190
Lubbock, Texas 79403
(w/o enclosures)