



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 28, 2008

Mr. Scott Campbell
Town Manager/PIO
Town of Sunnyvale
127 Collins Road
Sunnyvale, Texas 75182

OR2008-01190

Dear Mr. Campbell:

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# 301517.

The Town of Sunnyvale (the "town") received two requests for the personnel files of three named employees. The first requestor is one of the named employees, but the second requestor is not. You claim that the requested information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the town's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the written request for information. See Gov't Code § 552.301(e)(1)(C). The town received the first request for information on November 14, 2007, but it has not submitted a copy of this written request for information. We also note that you have redacted addresses from the submitted documents.² You do not

¹Although you assert the submitted information is specifically excepted under subsection 552.103(a)(7), we note that there is no subsection 552.103(a)(7) of the Government Code. We assume you intend to assert subsection 552.103(a) instead.

²We note that you have also redacted social security numbers. 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. However, the first requestor has

assert, nor does our review of our records indicate, that the town has been authorized to withhold such addresses without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). Thus, the town failed to comply with the procedural requirements mandated by section 552.301.

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); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.103 of the Government Code is discretionary in nature; it serves only to protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. In failing to comply with section 552.301, the town has waived its claim under section 552.103, and it may not withhold the submitted information under that section. But section 552.102 can provide a compelling reason to overcome this presumption; therefore, we will address your arguments under this exception. We note that sections 552.101, 552.117, 552.130, and 552.137 of the Government Code, which also provide compelling reasons to overcome this presumption, are also applicable to some of the remaining information.

Some of the documents at issue are medical records, access to which is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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.

a right of access to her own social security number. *See Gov't Code* § 552.023(a) ("a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests.").

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. *Id.* §§ 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 portion of the submitted information that constitutes medical records and that may only be released in accordance with the MPA.

The submitted information contains I-9 forms and their attachments, including the I-9 form of the first requestor. 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 protected by other statutes. 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). The release of the submitted I-9 forms in response to the requests for information would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, the submitted I-9 forms and their attachments, which we have marked, are excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law and may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system.

The submitted information also contains a W-4 tax form of the first requestor. Section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, the town must withhold the W-4 tax form from the second requestor under section 552.101 in conjunction with section 6103 of title 26 of the United States Code. However, section 6103(e) is an exception to the confidentiality provisions of section 6103(a) and it provides for disclosure of tax information to the taxpayer. *See* 26 U.S.C. § 6103(e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103

represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under FOIA). Therefore, pursuant to section 6103(e)(7) of title 26 of the United States Code, the town must release the W-4 tax form to the first requestor if such disclosure would not seriously impair federal tax administration. If such disclosure would seriously impair federal tax administration, then the town must withhold the tax form from the first requestor under section 552.101 in conjunction with section 6103.

You assert that the remaining information is excepted under section 552.102 of the Government Code. Section 552.102(a) excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 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 common-law privacy protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types 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. 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), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). But this office has found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

We have marked the information that is confidential under common-law privacy and that the town must withhold under section 552.102. But the remaining information is not confidential under common-law privacy, and the town may not withhold it on that ground. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document).

We note that section 552.117 of the Government Code may be applicable to some of the remaining information. 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 of the Government Code.

But a pager, fax, or cell phone number provided to an employee at public expense may not be withheld under section 552.117. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular mobile phone numbers provided and paid for by governmental body and intended for official use). Whether 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). Pursuant to section 552.117(a)(1), the town must withhold this personal information that pertains to a current or former employee of the town who elected, prior to the town's receipt of the request for information, to keep such information confidential. Such information may not be withheld for individuals who did not make a timely election. We have marked information that must be withheld if section 552.117 applies; however, the town may only withhold the cell phone and pager numbers if the employees at issue, rather than a governmental entity, paid for the cell phone or pager service. *See* Open Records Decision No.670 at 6 (2001).

Some of the remaining information is excepted under section 552.130 of the Government Code, which 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 town must withhold the Texas motor vehicle record information we have marked under section 552.130.

The submitted information contains account numbers. Section 552.136(b) of the Government Code provides that "[n]otwithstanding any other provision of this chapter, 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." The town must withhold the account numbers we have marked under section 552.136.³

The remaining information also contains e-mail addresses that are excepted under section 552.137 of the Government Code. Section 552.137 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). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the town must withhold the e-mail addresses we have marked under section 552.137.

Finally, we note that some of the submitted information pertains to the first requestor. Section 552.023 of the Government Code gives a person a special right of access to

³We have marked a representative sample of account numbers to be withheld under section 552.136 in some of the submitted documents.

information that relates to the person and that is protected from disclosure by laws intended to protect the person's privacy interest. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Common-law privacy and sections 552.117, 552.130, and 552.137 of the Government Code are intended to protect a person's privacy interest; therefore, the town may not withhold from the first requestor the information relating to her that we have marked under common-law privacy and sections 552.117, 552.130, and 552.137.

To conclude, the marked medical records may only be released in accordance with the MPA. The town must withhold marked I-9 forms under section 552.101 of the Government Code in conjunction with federal law. The town must withhold the first requestor's W-4 tax form under section 552.101 in conjunction with section 6103 of title 26 of the United States Code; however, the town must release this information to the first requestor pursuant to section 6103(e)(7) if such disclosure would not seriously impair federal tax administration. The town must withhold the account numbers we have marked under section 552.136 of the Government Code. The town must also withhold the following: the information we have marked under section 552.102 in conjunction with common-law privacy, the information we have marked under section 552.117 of the Government Code if the employees at issue timely elected to withhold that information and if the employees paid for the cell phone or pager service, the Texas motor vehicle record information marked under section 552.130 of the Government Code, and the e-mail addresses marked under section 552.137 of the Government Code; however, this information pertaining to the first requestor must be released to her pursuant to section 552.023 of the Government Code. The town must release the remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

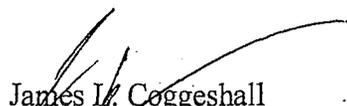
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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 challenge 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,



James I. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jh

Ref: ID# 301517

Enc. Submitted documents

c: Mr. Michael Geary
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(w/o enclosures)

Ms. Shana Reed
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