



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2008

Ms. Sylvia McClellan
Assistant City Attorney
City of Dallas
Criminal Law and Police Section
1400 South Lamar
Dallas, Texas 75215

OR2008-16392

Dear Ms. McClellan:

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# 328905.

The Dallas Police Department (the "department") received a request for a named officer's personnel file and any information concerning the date he went on leave due to injury and the date he returned to duty. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.130, 552.136, 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note a portion of the submitted information pertains to a police officer other than the officer named in the request. Thus, this information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

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.

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. You raise section 552.101 in conjunction with the federal Family and Medical Leave Act (the "FMLA"). See 29 U.S.C. § 2801 *et seq.* 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 provides 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). You generally assert that a portion of the submitted information falls within the scope of section 825.500(g). Based on our review of the information at issue, we conclude that none of the submitted information is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Therefore no part of the submitted information may be withheld under section 552.101 on this basis.

Next you generally assert that the submitted information may consist of records that are made confidential under of the Americans with Disabilities Act (the "ADA"). Section 552.101 encompasses the ADA, 42 U.S.C. §§ 12101 *et seq.* 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, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as confidential medical records. 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).

Federal regulations define "disability" for purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that:

physical or mental impairment means: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h). Upon review, we determine that none of the submitted information is confidential pursuant to the ADA. Accordingly, the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the ADA.

You have marked information that you claim is confidential under section 552.101 in conjunction with the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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(a), (b), (c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the information at issue does not consist of communications between a physician and a patient, nor is it records of the identity, diagnosis, evaluation, or treatment of a patient by a physician. Thus, we conclude the department may not withhold any portion of the information you have marked under section 552.101 in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. 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 concluded personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy).

You claim that the portion of the submitted information pertaining to the named officer's workers' compensation claim is private and should be withheld under 552.101. The Texas Supreme Court has determined there is nothing intimate or embarrassing about the fact that, in and of itself, an individual has filed a claim for workers' compensation. *Indus. Found.*, 540 S.W.2d at 686. In addition, this office has determined that the names of employees taking sick leave and the dates of sick leave taken are not confidential under common-law privacy. Open Records Decision No. 336 at 2 (1982). Therefore, the submitted information that reveals the amount of time that the named officer took off for injuries and the amount of money paid to the named officer is not intimate or embarrassing, and it is of legitimate public interest. See *Indus. Found.*, 540 S.W.2d at 686; Open Records Decision No. 336 at 2 (1982). The submitted information also does not reveal the medical nature of the injury sustained by the named officer or any other private facts pertaining to the named officer. See ORD 470 at 4. Therefore, we conclude that the submitted information is not confidential under common-law privacy, and it may not be withheld under section 552.101 on that ground.

Next, you claim that some of the submitted information may be protected from public disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code. Accordingly, the department must withhold the information you have marked, as well as the information we have marked, under section 552.117(a)(2).

Next, you contend the submitted information contains Texas motor vehicle record information that is subject to section 552.130 of the Government Code, which 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; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. Upon review, the department must withhold the information you have marked, as well as the information we have marked, under section 552.130 of the Government Code.

You claim the submitted employee ID numbers, which you have marked, are subject to section 552.136 of the Government Code. Section 552.136 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." *Id.* § 552.136. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). You inform us the employee ID number is the same number used for the city credit union bank accounts. Based on this representation, we find the department must withhold the employee ID numbers you have marked, in addition to the employee ID number we have marked, under section 552.136 of the Government Code.

Finally, section 552.147 of the Government Code states that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147.

Upon review, we agree that the department may withhold the social security numbers that you have marked under section 552.147 of the Government Code.²

In summary, the department must withhold the information you have marked, in addition to the information we have marked, under section 552.117 of the Government Code. The department must also withhold the information you have marked, as well as the information we have marked, under section 552.130 of the Government Code. The department must withhold the information you have marked and the information we have marked under section 552.136 of the Government Code. Lastly, the department may withhold the social security numbers you have marked under section 552.147 of the Government Code. The remaining 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 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). If the governmental body does not file suit over 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

²Section 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. Gov't Code § 552.147(b).

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,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/jb

Ref: ID# 328905

Enc. Submitted documents

c: Requestor
(w/o enclosures)