



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 12, 2009

Ms. Michelle T. Rangel
Assistant County Attorney
Fort Bend County Attorney's Office
301 Jackson Street, Suite 728
Richmond, Texas 77469

OR2009-01933

Dear Ms. Rangel:

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# 334790.

The Fort Bend County Attorney's Office (the "county attorney") received a request for information pertaining to a deceased employee of Fort Bend County. You indicate that some of the requested information has been released. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information protected by other statutes, such as section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held 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). 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).

Section 6103(e) is an exception to the confidentiality provisions of section 6103(a) that provides for disclosure of tax information to the taxpayer and certain other persons having a material interest in the return. *See id.* § 6103(e)(3) (return of decedent shall be disclosed to next of kin with material interest which will be affected by return information); Rev. Rul. 2004-68, 2004-31 I.R.B. 118 (existence of material interest of next of kin as person affected by return information presumed); *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 5 U.S.C. § 552a(d)(1) to federal agency records concerning self). Further, return information may be disclosed to any person authorized to receive or inspect a return of the taxpayer, if such disclosure would not seriously impair federal tax administration. *See* 26 U.S.C. § 6103(e)(7). The person requesting access to return information under section 6103(e)(3) must provide proof of the following: (1) relationship to the decedent; (2) the date and place of death, and state of decedent's residence; and (3) the material interest that will be affected. Rev. Rul. 2004-68, 2004-31 I.R.B. 118.

In this instance, the requestor states she is the mother of the deceased employee whose W-4 forms are at issue. Therefore, upon receipt of the required proof, the county attorney must release the W-4 tax forms we have marked in Exhibit D to the requestor pursuant to sections 6103(e)(3) and 6103(e)(7), provided that such disclosure would not seriously impair federal tax administration. Otherwise, the marked W-4 tax forms are confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code. The remaining information in Exhibit D does not constitute tax return information for the purposes of section 6103 of title 26 of the United States Code and may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in 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.

Id. § 159.002(a)-(c). This office has concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990).

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, .005. Medical records pertaining to a deceased patient may only be released upon the signed consent of the deceased's personal representative. *See id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the medical records in Exhibit C that are confidential under the MPA. This information may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991). The remaining information in Exhibit C does not constitute medical records for the purposes of the MPA and may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (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. This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. *See* Open Records Decision Nos. 600 (1992) (personal financial choices concerning insurance are generally confidential), 545 (1990) (common law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common law privacy protects assets and income source information). We note that because "the right of privacy is purely personal," that right "terminates upon the death of the person whose privacy is invaded." *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 at 1 (1981). Thus, information pertaining to deceased individuals is not confidential under common-law privacy.

The submitted documents contain information pertaining to life insurance. Generally, we find that the decision to obtain life insurance is a private, financial decision that is excepted from disclosure under common law privacy pursuant to section 552.101. In this instance, however, the insured party is deceased, and thus the insured party's right to privacy has

lapsed. *See Moore*, 589 S.W.2d at 491; Open Records Decision No. 272 at 1 (1981). However, the beneficiary of the insurance policy have a separate right to privacy. Therefore, the information that would reveal the beneficiary's identity is protected by common law privacy. Upon review, we find that the information we have marked in Exhibit B, consisting of the beneficiary's identity and a living individual's personal financial information, is highly intimate or embarrassing and not of legitimate public concern. Therefore, the county attorney must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The county attorney has failed to demonstrate, however, how the remaining information in Exhibit B is highly intimate or embarrassing and not of legitimate public interest. Therefore, the county attorney may not withhold any portion of the remaining information in Exhibit B under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and home telephone numbers, social security numbers, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024.¹ We note that a post office box number is not a "home address" for purposes of section 552.117.² We also note section 552.117 also encompasses a personal cellular telephone number, unless the service is paid for by a governmental body. *See Open Records Decision Nos. 670 at 6 (2001), 506 at 5-7 (1988)* (statutory predecessor to section 552.117 not applicable to cell phone numbers provided and paid for by governmental body and intended for official use). 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)*. Therefore, the county attorney may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You have not informed us whether the individuals at issue have made timely elections for confidentiality under section 552.024. Accordingly, if these individuals timely elected to keep their personal information confidential, and if the individual at issue paid for her own cellular telephone service, the county attorney must withhold the information we have marked in Exhibits B, C, E, and F under section 552.117(a)(1). The county attorney may not withhold the marked information under

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

²*See Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994)* (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)).

section 552.117(a)(1) if these individuals did not make a timely election to keep this information confidential, or if the county provided the cellular telephone service.³

Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. We note that the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, Texas motor vehicle record information that pertains to a deceased individual may not be withheld under section 552.130. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 at 1 (1981). The county attorney must withhold the Texas motor vehicle record information we have marked in Exhibit E under section 552.130 of the Government Code.

Section 552.136 of the Government Code states 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." Gov't Code § 552.136. The county attorney must withhold the information we have marked in Exhibits E and F under section 552.136 of the Government Code.

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.⁴ *Id.* § 552.147. By its terms, section 552.147 is not applicable to the social security number of a deceased individual. Therefore, the county attorney may withhold only the social security numbers which pertain to living individuals under section 552.147 of the Government Code.

In summary, upon receipt of the required proof, the county attorney must release the marked W-4 tax forms in Exhibit D to the requestor pursuant to sections 6103(e)(3) and 6103(e)(7) of title 26 of the United States Code, provided that such disclosure would not seriously impair federal tax administration. Otherwise, the marked W-4 tax forms are confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code. The medical records we have marked in Exhibit C are confidential under the MPA and may only be released in accordance with the MPA. The county attorney must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals at issue timely elected to keep their personal information confidential, and if the individual at issue paid for her own cellular telephone service, the county attorney must

³We 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.

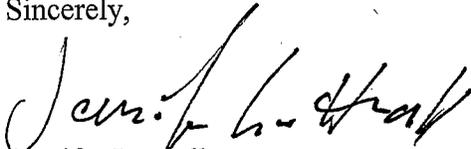
⁴We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

withhold the information we have marked in Exhibits B, C, E, and F under section 552.117(a)(1). The county attorney must withhold information we have marked in Exhibit E under section 552.130 of the Government Code. The county attorney must also withhold the information we have marked in Exhibits E and F under section 552.136 of the Government Code. The county attorney may withhold only the social security numbers which pertain to living individuals under section 552.147 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 334790

Enc. Submitted documents

c: Requestor
(w/o enclosures)