



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2009

Ms. Melanie L. Hollmann
Atkins, Hollmann, Jones, Peacock, Lewis & Lyon
3800 East 42nd Street, Suite 500
Odessa, Texas 79762

OR2009-02914

Dear Ms. Hollmann:

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# 336444.

The Ector County Independent School District (the "district"), which you represent, received a request for e-mails sent to and from a named individual during a specified time period, and web sites visited by the named individual during the same time period. You state that the district has released portions of the requested information. You state that the district has redacted or withheld some of the responsive information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹The United States Department of Education Family Compliance Office has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of review in the open records ruling process under the Act. Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education record.

Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations 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, except as provided by parts 160 and 164 of the Code of Federal Regulations. See *id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), 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 ORD 681 at 8; 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. See *Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; see also Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the district may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Section 552.101 also encompasses the doctrine of 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). 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. 540 S.W.2d at 683. Information also excepted from required public disclosure under common-law privacy includes 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 information concerning the intimate relations between individuals and their family members, see Open Records Decision No. 470 (1987). We note that this office has found that the public has a legitimate interest in information that relates to public employment and public employees, and information that pertains to an employee's actions as a public servant generally cannot be considered beyond the realm of legitimate public interest. See Open Records Decisions Nos. 542 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find that the information we have marked is subject to common-law privacy, and must be withheld under section 552.101 of the Government Code.

We will next address your claim under section 552.117. You inform us that the submitted information includes a list that contains the cellular telephone numbers and home telephone numbers for all district assigned peace officers. Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We note that section 552.117(a)(2) of the Government Code is applicable to a peace officer's cellular telephone number only if the cellular telephone service is paid for by the officer with his or her own funds. See Open Records Decision No. 670 at 6 (2001). In this instance, some of the submitted information concerns an officer who is no longer employed by the Ector County Independent School District Police Department (the "department"). Additionally, it is unclear whether the cellular telephone service for the numbers at issue were paid for by the peace officers for their personal use or by the department for official use. Thus, we must rule conditionally. If the former peace officer at issue is still a licensed peace officer, then the district must withhold the home telephone number we have marked under section 552.117(a)(2). If the former peace officer at issue is still a licensed peace officer, and the service for the listed cellular telephone number was paid for by the former peace officer for personal use, then the district must also withhold the cellular telephone number we have marked under section 552.117(a)(2). Further, the district must withhold the remaining home telephone numbers related to currently licensed peace officers you have marked under section 552.117(a)(2). If the peace officers at issue paid for their cellular telephone number service, the district must also withhold the corresponding cellular telephone numbers under section 552.117(a)(2).

We note that if the former officer at issue is no longer a peace officer, then the district may be required to withhold his home address and cellular telephone number under section 552.117(a)(1). Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld 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 of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, the district must withhold the former officer's home address and cellular telephone number we have marked under section 552.117(a)(1) if the former officer timely requested confidentiality for that information under section 552.024. Likewise, the district must withhold the information we have marked under section 552.117(a)(1) if the individuals at issue timely elected to keep their personal information confidential under section 552.024.

In summary, (1) the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) if the former peace officer at issue is still a licensed peace officer, then the district must withhold the home telephone number we have marked under section 552.117(a)(2); (3) if the former peace officer at issue is still a licensed peace officer, and the service for the listed cellular telephone number was paid for by the former peace officer for personal use, then the district must withhold the cellular telephone number we have marked under section 552.117(a)(2); (4) the district must withhold the remaining home telephone numbers related to currently licensed peace officers you have marked under section 552.117(a)(2); (5) if the peace officers at issue paid for their cellular telephone number service, the district must withhold the corresponding cellular telephone numbers under section 552.117(a)(2); and (6) the district must withhold the information we have marked under section 552.117(a)(1) if the individuals at issue timely elected to keep their personal information confidential under section 552.024. The remaining information must be released to the requestor.

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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 336444

Enc. Submitted documents

c: Requestor
(w/o enclosures)