ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 24, 2009

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2009-10273

Dear Ms. Lytle:

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# 350916.

The El Paso County Attorney's Office (the "county") received a request for information pertaining to an investigation into possible violations of the Act by a specific individual. You state that you will release most of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You state that the submitted information was provided to the county by the El Paso Mental Health/Mental Retardation Center ("MH/MR"). You further state copies of the submitted information have already been released to the requestor by an attorney for MH/MR. Section 552.007 of the Government Code generally prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public. Gov't Code § 552.007. Section 552.007 provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See id.*; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision Nos. 490 (1988), 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may

not disclose information made confidential by law). In this instance, the county raises sections 552.101 and 552.102 of the Government Code, which govern information considered to be confidential by law. *See* Gov't Code § 552.101, .102. Thus, regardless of whether the information at issue has been previously released, we must address whether the submitted information is made confidential by law and must now be withheld pursuant to sections 552.101 and 552.102 of the Government Code.

Next, we note you have redacted addresses, dates of birth, and social security numbers from the submitted documents. Section 552.147(b) 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, you do not assert, nor does our review of our records indicate, that you have been authorized to withhold the remaining redacted information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested" or representative sample), .302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes, including 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 No. 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). You assert, and we agree, the county must withhold the W-4 forms in Attachment E under section 552.101 in conjunction with federal law.

Section 552.101 also encompasses section 301.085 of the Labor Code. This statute declares that unemployment compensation information is not public information for purposes of the Act. Labor Code § 301.085(c). This statute defines unemployment compensation

information as "information in the records of the [Texas Workforce C]ommission that pertains to the administration of Subtitle A [the Texas Unemployment Compensation Act], including any information collected, received, developed, or maintained in the administration of unemployment compensation benefits or the unemployment compensation tax system." *Id.* § 301.085(a). You contend that the document in Attachment D is confidential pursuant to section 301.085. However, section 301.085 applies to information in the records of the Texas Workforce Commission. The document in Attachment D is from the personnel file of a MH/MR employee. Therefore, it is not confidential under section 301.085, and it may not be withheld on that basis.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

> (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(b)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002,.004; Open Records Decision No. 598 (1991). 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). Medical records may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991). Upon review, we find portions of the information in Attachment C, which we have marked, constitute medical records that may only be released in accordance with the MPA.

Next, you claim portions of the submitted information are confidential pursuant to section 552.101 in conjunction with common-law privacy and pursuant to 552.102 of the Government Code. Section 552.102(a) 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. In *Hubert v. Harte-Hanks Texas Newspapers,* 652 S.W.2d 546 (Tex. App.–Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board,* 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under

the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will address your privacy claims under sections 552.101 and 552.102 together.

For information to be protected from public disclosure by the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation.* In *Industrial Foundation,* the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *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. In addition, this office has found that medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, there is a legitimate public interest in a transaction between an individual and a government entity. Upon review, we find the information we have marked in Attachment B and in Attachment C is protected by common-law privacy and must be withheld under section 552.101 of the Government Code. No portion of the remaining information constitutes highly intimate or embarrassing information of no legitimate public interest. Therefore, no portion of the remaining information may be withheld under either section 552.101 or section 552.102 on that basis.

In conclusion, the county must withhold the W-4 forms in Attachment E under section 552.101 of the Government Code in conjunction with federal law. The county may only release the medical records we have marked in Attachment C in accordance with the MPA. The county must withhold the information we have marked in Attachment B and in Attachment C under section 552.101 of the Government Code in conjunction with common-law privacy. The county must release the remaining information.

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,

Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/eeg

Ref: ID# 350916

Enc. Submitted documents

c: Requestor
(w/o enclosures)