



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2011

Mr. Stephan B. Rogers
Rogers & Moore, PLLC
309 Water Street, Suite 114
Boerne, Texas 78006

OR2011-08435

Dear Mr. Rogers:

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# 420564.

The Boerne Independent School District (the "district"), which you represent, received a request for six categories of personnel information pertaining to a named individual. You indicate the district is releasing some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.136 of the Government Code. You also state that release of the submitted information may implicate the privacy interests of the named individual. Accordingly, you inform us that you notified the individual of the request and of the right to submit arguments to this office as to why her information should not be released.¹ See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, you have provided this office with correspondence from the requestor specifying that she is not requesting: 1) information relating to a transcript from an institution of higher education; 2) the named individual's date of birth, driver's license information, home address, home telephone number, social security number, or family member information; 3)

¹We note that, to date, we have not received any comments from the individual who was notified asserting a privacy interest in any of the submitted information.

any privileged attorney-client or work product information; and 4) any privileged agency memoranda. Accordingly, these categories of information are not responsive to the request for information. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 6103(a) of title 26 of the United States Code. Section 6103(a) 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 his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, 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 with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, 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), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Upon review, we find the district must withhold the W-4 form we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Next, we note the responsive information includes an I-9 form (Employment Eligibility Verification) and attachments, which are governed by section 1324a of title 8 of the United States Code. This section, which is also encompassed by section 552.101 of the Government Code, provides that an I-9 form and "any information contained in or appended to such form, 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). Release of the form and attachments in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the submitted I-9 form and attachments, which we have marked, are confidential under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 of the Government Code also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). The remaining responsive information includes ExCET exam results. We note subsection 21.048(c-1)(1) is not applicable in this instance. Furthermore, the information reflects the educator has not failed the examination more than five times. Thus, we find the information we have marked is confidential under section 21.048(c-1) of the Education Code and the district must withhold this information under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” *Id.* § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we concluded that a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a certificate or permit required under chapter 21 of the Education Code and (2) is teaching at the time of his or her evaluation. *Id.* The submitted information reveals that the individual at issue held a teacher’s certificate or permit under chapter 21 of the Education Code and was performing the functions of a teacher at the time of her evaluations. Therefore, the district must withhold the evaluations we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which provides confidentiality for medical records. 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.

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 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 that the information we have marked consists of medical records and information taken from medical records that may only be released in accordance with the MPA.

Section 552.101 of the Government Code also encompasses section 611.002(a) of the Health and Safety Code, which provides “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004, .0045. Upon review, we find the information we have marked consists of mental health records. Accordingly, the district must withhold the information we marked pursuant to section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if it (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. *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* include 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 personal financial information not related to a financial transaction between an individual and a governmental body is highly intimate or embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 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). In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by 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). We note that this office has stated, in numerous decisions, that information pertaining to the work conduct, job performance, and qualifications of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (public employee's job performance does not generally constitute employee's private affairs), 455 (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find that the information we have marked in the responsive information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. We note, however, that the remaining responsive information pertains to the work conduct, job performance, and qualifications of a public employee and is subject to a legitimate public interest. Accordingly, none of the remaining responsive information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code 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(a). You claim the remaining responsive information is excepted under section 552.102(a) in conjunction with the ruling in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). In *Texas Comptroller*, the Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller*, 2010WL4910163, at *10. Having carefully reviewed the remaining responsive information, we find that none of it is excepted under section 552.102(a) and, therefore, none of it may be withheld on that basis.

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(b). You state the district has redacted bank account numbers and bank routing numbers pursuant to section 552.136 of the Government Code and Open Records Decision No. 684 (2009).² Upon review, the department must also withhold the additional bank account and routing numbers and the insurance policy number we have marked under section 552.136 of the Government Code.

²This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including bank account and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Section 552.137 of the Government Code provides that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). *Id.* § 552.137(a)-(c). We have marked personal e-mail addresses in the remaining information that do not appear to fall within the scope of section 552.137(c). The marked e-mail addresses must be withheld under section 552.137, unless the owner of an e-mail address has affirmatively consented to its public disclosure.

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction section 6103(a) of title 26 of the United States Code. The marked I-9 form and attachments must be withheld under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with sections 21.048(c-1) and 21.355 of the Education Code. The marked medical records may only be released in accordance with the MPA. The district must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 611.002(a) of the Health and Safety Code and common-law privacy. The district must withhold the marked information under section 552.136 of the Government Code and the information we marked under section 552.137 of the Government Code, unless the owner of an e-mail address has affirmatively consented to its public disclosure. The remaining information must be released.³

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

³We note the previous determination in Open Records Decision No. 684 (2009) authorizes governmental bodies to withhold the following categories of information without the necessity of requesting an attorney general decision: W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; a Form I-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; a direct deposit authorization form under section 552.101 of the Government Code in conjunction with the common-law right to privacy; bank account, bank routing, and insurance policy numbers under section 552.136 of the Government Code; and an e-mail address of a member of the public under section 552.137 of the Government Code.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/em

Ref: ID# 420564

Enc. Submitted documents

c: Requestor
(w/o enclosures)