



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 23, 2015

Ms. Lisa Calem-Lindström
Public Information Coordinator
Texas Facilities Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR2015-15022

Dear Ms. Calem-Lindstrom:

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# 572718 (ORR# 572718).

The Texas Facilities Commission (the "commission") received a request for the personnel files of twelve named current and former commission employees.¹ You state the commission has released some of the requested information. You argue some of the submitted information is not subject to the Act. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, 552.136, 552.137, and 552.139 of the Government Code.² We have considered the submitted arguments and reviewed the submitted information.

¹You state the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although you do not raise section 552.137 of the Government Code in your brief, we understand you to raise this exception based on your markings.

Initially, you assert the submitted username and password and the voice mail passwords, which you have marked, are not subject to the Act. We also note the submitted information contains a peace officer's Texas Commission on Law Enforcement ("TCOLE") identification number, which we have marked. Section 552.002(a) defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body; for a governmental body and the governmental body owns, has a right of access to, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body. Gov't Code. § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You inform our office the username and password and the voice mail passwords at issue are used solely as a tool to protect public property and have no other significance other than their use as tools for the maintenance, manipulation, or protection of public information. Further, we understand an officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in TCOLE's electronic database, and may be used as an access device number on TCOLE's website. Based on your representations and our review, we find the username, passwords, and TCOLE identification number at issue do not constitute public information under section 552.002 of the Government Code. Therefore, we conclude the username, passwords, and TCOLE identification number at issue are not subject to the Act and the commission is not required to release them. As we are able to make this determination, we do not address your remaining arguments against their disclosure.

Next, we must address the commission's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(e), within fifteen business days of receiving an open records request, a governmental body is required to submit to this office, among other items, a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents, unless there has been a previous determination that the information falls within an exception to disclosure. *Id.* § 552.301(e)(4). You inform us the commission has withheld student transcripts under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code, and section 552.114 of the Government Code, and you have not submitted these documents for our review. Section 552.114(a) excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office has determined the same analysis applies under section 552.114 and FERPA. FERPA governs the availability of student records held by

educational institutions or agencies receiving federal funds. We note section 552.114 and FERPA apply only to student records in the custody of an educational institution and records directly transferred from an educational institution to a third party. *See* 34 C.F.R. § 99.33(a)(2). We further note the commission is not an educational institution. *See* Open Records Decision No. 309 at 3 (1983) (City of Fort Worth not an “educational agency” for purposes of FERPA). Moreover, you do not explain the requested transcripts were transferred directly to the commission from an educational institution. We therefore conclude the commission may not withhold the transcripts at issue on the basis of section 552.114 of the Government Code or FERPA. Accordingly, because the commission did not submit the transcripts for our review, we find the commission failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third-party interests. *See* Open Records Decision No. 630 (1994). Because you have not submitted the transcripts at issue for our review, we have no basis for finding the transcripts excepted from disclosure or confidential by law. Thus, we have no choice but to order the transcripts released pursuant to section 552.302. If you believe the information at issue is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

We now turn to the submitted arguments against disclosure of the remaining information. 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 statute, such as the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. 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). We have further found when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

Upon review, we find a portion of the responsive information, which we have marked, constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician and information obtained from a patient's medical records. Accordingly, the commission must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA. However, we find you have not demonstrated how any portion of the remaining information consists of medical records for purposes of the MPA, and the commission may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses federal law such as the Family and Medical Leave Act (the “FMLA”). *See* 29 U.S.C. §§ 2601 *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 states:

[r]ecords and documents relating to 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 the ADA, as amended, 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). We note a portion of the remaining documents, which we have marked, is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA apply to this information. Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to a 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) (designation of beneficiary of employee's retirement benefits, direct deposit authorization, and 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), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). This office has also determined a public employee's net pay is protected by common-law privacy even though it involves a financial transaction between the employee and the governmental body. *See* Attorney General Opinion GA-0572 at 3-5 (2007) (net salary necessarily involves disclosure of information about personal financial decisions and is background financial information about a given individual that is not of legitimate concern to public). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs 600 at 9 (information revealing employee participates in

group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy). Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the commission must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any of the remaining information you marked is highly intimate or embarrassing and not of legitimate public concern. Thus, the commission may not withhold any portion of the remaining information 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). 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 of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Accordingly, the commission must withhold the employee dates of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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. The submitted documentation reveals all but one of the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code. Accordingly, the commission must withhold the information we have marked pertaining to these individuals under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service.³ However, we find you have not demonstrated the applicability of section 552.117(a)(1) of the Government Code to the

³Regardless of the applicability of section 552.117 of the Government Code, we note 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. *See* Gov’t Code § 552.147(b).

remaining information you marked pertaining to these individuals, and the commission may not withhold any of the remaining information you marked on that basis.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the commission must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. However, you have not demonstrated how any of the remaining information you marked consists of motor vehicle record information under section 552.130 of the Government Code, and the commission may not withhold any of the remaining information on that basis.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the commission must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the commission must withhold (1) the medical records we marked under section 552.101 of the Government Code in conjunction with the MPA; (2) the information we marked under section 552.101 of the Government Code in conjunction with the FMLA; (3) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (4) the employee dates of birth we marked under section 552.102(a) of the Government Code; (5) the information we marked under section 552.117(a)(1) of the Government Code, but may withhold the marked cellular telephone number only if a governmental body does not pay for the cellular telephone service; (6) the motor vehicle record information we marked under section 552.130 of the Government Code; and (7) the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The commission must release the remaining responsive 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Claire Morris Sloan". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 572718

Enc. Submitted documents

c: Requestor
(w/o enclosures)