



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 9, 2016

Mr. Stephen D. Gates
Assistant City Attorney
City of Midland
P.O. Box 1152
Midland, Texas 79702

OR2016-17920

Dear Mr. Gates:

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# 622070 (Midland ID #19604).

The City of Midland (the "city") received a request for the personnel file of a named city employee. You state the city has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.140 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 disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 437.232 of the Government Code, which provides as follows:

- (a) In this section, "military personnel information" means a service member's name, home address, rank, official title, pay rate or grade, state active duty orders, deployment locations, military duty addresses, awards and decorations, length of military service, and medical records.
- (b) A service member's military personnel information is confidential and not subject to disclosure under Chapter 552.

Id. § 437.232. Section 437.232 is contained in subchapter E of chapter 437 of the Government Code. Chapter 437 is titled “Texas Military” and subchapter E is titled “Texas Military Forces.” Upon review, we find section 437.232 only applies to military personnel records maintained by the Texas Military Forces. *See id.* § 437.001(14) (providing that “Texas military forces” for purposes of chapter 437 mean the Texas National Guard, the Texas State Guard, and any other military forces under state law). The submitted information you seek to withhold is found in a personnel file maintained by the city. Thus, section 437.232 is not applicable to the information at issue, and the city may not withhold Exhibit C or Exhibit G under section 552.101 of the Government Code in conjunction with section 437.232 of the Government Code.

Section 552.101 of the Government Code also encompasses 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 federal tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms), 226 (1979) (W-2 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 Treasury] 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), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993). Thus, the submitted W-4 forms in Exhibit E constitute tax return information that is confidential under section 6103(a) of title 26 of the United States Code and must generally be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses information made confidential 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).* Upon review, we agree the information submitted as Exhibit B 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, Exhibit B is confidential under the MPA and must generally be withheld under section 552.101 of the Government Code.

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.¹ *See Gov't Code § 552.130(a).* Accordingly, the city must generally withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

You raise section 552.140 of the Government Code for the DD-214 form submitted as Exhibit D. Section 552.140 provides, in part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

(b) The record is confidential for the 75 years following the date it is recorded with or otherwise first comes into the possession of a governmental body. During that period the governmental body may permit inspection or copying

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

of the record or disclose information contained in the record only in accordance with this section or in accordance with a court order.

(c) On request and the presentation of proper identification, the following persons may inspect the military discharge record or obtain from the governmental body free of charge a copy or certified copy of the record:

...

(6) another governmental body[.]

Id. § 552.140(a), (b), (c)(6). Section 552.140 provides a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a)-(b). We understand you to assert the DD-214 forms at issue came into the city's possession after September 1, 2003. However, section 552.140(c)(6) provides a governmental body must release a discharge form to another governmental body upon request and presentation of proper identification. *See id.* § 552.140(c)(6). We note, and you acknowledge, the requestor is a representative of the Texas Department of State Health Services (the "DSHS"). Accordingly, we find the requestor has a right of access to the DD-214 forms in Exhibit D under section 552.140(c)(6) of the Government Code.

As noted above, the requestor is a representative of the DSHS. In her request, the requestor informs the city she is seeking the requested information as part of an investigation she is conducting pursuant to chapter 773 of the Health and Safety Code. Section 773.0612 of the Health and Safety Code provides the DSHS or its representative "is entitled to access to records and other documents . . . that are directly related to . . . emergency medical services personnel to the extent necessary to enforce [chapter 773 of the Health and Safety Code] and the rules adopted under [chapter 773 of the Health and Safety Code]." Health & Safety Code § 773.0612(a). The submitted information pertains to an emergency medical technician licensed under chapter 773 of the Health and Safety Code. Because the submitted information is directly related to an emergency medical technician and the requestor is conducting an investigation under chapter 773, we conclude section 773.0612 of the Health and Safety Code applies to the submitted information. Accordingly, we will consider whether section 773.0612 of the Health and Safety Code permits the DSHS to obtain information that is otherwise protected by section 6103(a) of title 26 of the United States Code, the MPA, and section 552.130 of the Government Code.

As noted above, the submitted W-4 forms in Exhibit E are confidential pursuant to section 6103(a) of title 26 of the United States Code. As federal law, section 6103(a) preempts any conflicting state provisions, including section 773.0612 of the Health and

Safety Code. *See Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Accordingly we find that, notwithstanding section 773.0612 of the Health and Safety Code, the city must withhold the submitted W-4 forms in Exhibit E under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

With respect to the information protected from public disclosure by section 159.002 of the MPA and section 552.130 of the Government Code, we find there is a conflict between the confidentiality provided by these statutes and the right of access afforded to the DSHS under section 773.0612 of the Health and Safety Code. Where general and specific provisions are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. *See Gov't Code* § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). Although section 773.0612 of the Health and Safety Code generally allows the DSHS access to information pertaining to emergency services personnel, section 159.002 of the MPA specifically protects medical records, and section 552.130 specifically protects motor vehicle record information. We also note section 552.130 was enacted after section 773.0612.² Further, because section 552.130 has its own access provisions, we conclude section 552.130 is not a general exception under the Act. *See Open Records Decision Nos.* 613 at 4 (1993), 451 at 4 (1986). We therefore conclude the confidentiality provided by the MPA and section 552.130 is more specific than the general right of access provided under section 773.0612. Accordingly, notwithstanding section 773.0612, the city must withhold from disclosure under section 552.101 of the Government Code the information that is confidential under section 159.002 of the MPA, and the motor vehicle record information that is confidential under section 552.130 of the Government Code.

You assert some of the remaining information is excepted under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.102 of the Government Code. We note statutes governing the release of specific information prevail over the general exceptions to disclosure found in the Act. *See ORDs* 613 at 4, 451. Further, statutory access provisions generally prevail over the common law. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when it directly conflicts with common-law principle); *see also Cash Am. Int'l. Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000) (statute depriving person of common-law right will not be extended beyond its plain meaning or applied to cases not clearly within its purview). Therefore, the city may not withhold any of

²*Compare* Act of May 30, 1997, 75th Leg. R.S., ch. 1187, § 4, 1997 Tex. Gen. Laws 4575, 4580 (codified at section 552.130 of Government Code), *with* Act of March 25, 1991, 72nd Leg., R.S., ch. 14, § 264, 1991 Tex. Gen. Laws 42, 206 (codified at section 773.0612 of Health and Safety Code).

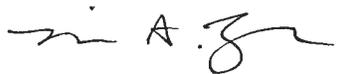
the remaining information from the requestor under section 552.101 of the Government Code in conjunction with common-law privacy or under section 552.102 of the Government Code.

In summary, the city must withhold Exhibit E under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The city must withhold Exhibit B under section 552.101 of the Government Code conjunction with the MPA. The city must withhold the information we have marked under section 552.130 of the Government Code. The city must release the remaining information.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.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,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/bw

Ref: ID# 622070

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³Because the requestor has a special right of access to some of the information being released, the city must again seek a decision from this office if it receives another request for the same information from another requestor.