



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 26, 1997

Ms. Kate Herrington
Open Records Coordinator
Texas Department of Mental Health
and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR98-0246

Dear Ms. Herrington:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 111883.

The Texas Department of Mental Health and Mental Retardation ("MHMR") received a request for "all MHMR employees' Sick Leave Pool Request applications and MHMR's responses thereto, submitted in the past two years." In response to the request, you submitted to this office for review a representative sample of the records, which you contend is responsive.¹ You state that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first consider the application of section 552.103 to the requested information. To secure the protection of section 552.103(a), MHMR must demonstrate that the requested information "relates" to a pending or reasonably anticipated litigation to which the district is a party. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision Nos. 588 (1991) at 1, 551 (1990) at 4. The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 (1990) at 3.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You argue that the submitted records are protected under section 552.103, based on anticipated litigation involving the requestor's client and another individual. You have not explained, nor is it apparent to this office, how the information relates to the anticipated litigation. We therefore conclude that you have not met your burden in establishing the applicability of section 552.103 in this instance. Therefore, MHMR may not withhold the requested information under this exception.

We next address whether section 552.101 protects any of the information which is in the possession of MHMR. Section 552.101 of the Government Code excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses both common-law and constitutional privacy. Under common-law privacy, private facts about an individual are excepted from disclosure. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: 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), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

We note that section 552.102 is implicated by this open records request, since the requested records pertain to public employees. Section 552.102(a) excepts from public disclosure

information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982). *See also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public.² *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

Section 552.102(a) may be invoked only when information reveals "intimate details of a highly personal nature." Open Records Decision No. 315 (1982). The requestor is seeking MHMR employees' sick leave pool application requests and MHMR's responses. In Open Records Decision No. 336 (1982), this office concluded that the names of employees taking sick leave and the dates thereof are not excepted by section 552.102. After reviewing the responsive information, we conclude that only certain responses to the fields on the application form requiring disclosure of the claimed "catastrophic" injury or condition, as well as references to the claimed illness or condition in your response letters, are protected by both section 552.101 and 552.102. We have marked and bracketed the type of information that must be withheld under sections 552.101 and 552.102. However, the remaining information, including the employee names on the sick leave pool applications and the dates, and MHMR's response letters, may not be withheld under neither section 552.101 or 552.102.

Although you did not raise any other exception to disclosure, we must consider whether some of the requested information must be withheld pursuant to sections 552.024 and 552.117. Section 552.117 of the Government Code excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117 requires you to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information if the employee had not made a request for confidentiality under section 552.024

²Generally, employee privacy under section 552.102(a) is less broad than common-law privacy under section 552.101, because of the greater public interest in disclosure of information regarding public employees. Open Records Decision Nos. 269 (1981), 169 (1977).

prior to the time this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made.³ Open Records Decision No. 530 (1989) at 5. Accordingly, you must redact the information subject to section 552.117 wherever it is located in the submitted records.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 111883

Enclosures: Marked documents

cc: Ms. Karen Key Johnson
Attorney at Law
P.O. Box 9411
Austin, Texas 78766
(w/o enclosures)

³We note that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.