



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 21, 1998

Honorable David F. Montgomery
Medina County Judge
Courthouse
1100 16th Street
Hondo, Texas 78861-0039

OR98-2262

Dear Judge Montgomery:

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# 118464.

The County of Medina (the "county") received a request for all materials that pertain to the county auditor. Although you raise no exceptions on behalf of the county, you assert that the auditor may have a privacy interest in the requested information. We have considered your arguments and reviewed the submitted information.

You explain that the information at issue is a compilation of complaints from citizens and county employees regarding the conduct of the county auditor. You state that these complaints have been forwarded to the district judge who has the powers of appointment and removal of the county auditor. You ask whether you may simply refer the requestor to the district judge. It is apparent from your statements that the county possesses a copy of these complaints. The Open Records Act unequivocally mandates the production of public information by the governmental body. *See* Gov't Code §§ 552.021, 552.221(a). Consequently, you may not refer the requestor to a third party in order to obtain information in your possession.

We will now address your arguments against disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by constitutional or common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, 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 at 1 (1992).

The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

The information at issue pertains solely to an employee's actions while acting as a public servant and the conditions for continued employment, and as such cannot be deemed to be outside the realm of public interest. Therefore, we do not believe that the auditor has a privacy interest in the submitted documents. Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

It appears, however, that the submitted documents contain allegations of sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Based on *Ellen*, we believe that the county must withhold information which would tend to identify the witnesses and victims of any alleged sexual harassment discussed within the documents. We have marked the information which must be withheld. However, we find that the public interest in the statements of the alleged harasser outweighs any privacy interest he may have in that information. Therefore, to the extent this information exists, the county may not withhold his statements or written correspondence.

We also note that one of the submitted documents is protected by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. The MPA protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. We have marked the document that may only be released as provided by the MPA.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 118464

Enclosures: Marked documents

cc: Mr. Ralph Bernsen
Medina County Attorney
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Hondo, Texas 78861
(w/o enclosures)