



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 21, 1998

Mr. Vernon M. Arrell
Commissioner
Texas Rehabilitation Commission
4900 N. Lamar Blvd.
Austin, Texas 78751-2399

OR98-2470

Dear Mr. Arrell:

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# 118769.

The Texas Rehabilitation Commission (the "commission") received a request for the entire investigation file concerning two named employees. You indicate that the responsive information, Project 98-280, consists of the commission's internal investigation, including audio tapes, of an employee who is alleged to have violated client confidentiality. You assert that the requested investigation materials are excepted from required public disclosure by sections 552.101, 552.102, 552.116, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

You first contend that the requested materials in their entirety may be withheld under section 552.116. You explain that the Management Audit Division of the commission conducted an investigation into the possible violation of client confidentiality by a commission employee. You state that the commission follows statutory requirements and complies with the professional auditing standards established by the profession. Section 552.116 of the Government Code excepts from disclosure

an audit working paper or draft audit report of the state auditor or of another state agency or institution of higher education as defined by Section 61.003, Education Code.

The legislation enacting section 552.116 also defines the term “audit working paper” as

all documentary and other information prepared or maintained in conducting an audit or investigation, including all intra-agency and interagency communications relating to an audit or investigation and all draft reports or portions thereof.

Act of May 29, 1997, 75th Leg., R.S., ch. 1122, § 2, 1997 Tex. Gen. Laws 4266, 4267 (amending Gov’t Code 321.001). Section 321.0136 of the Government Code defines “investigation” for purposes of chapter 321 as

an inquiry into specified acts or allegations of impropriety, malfeasance, or nonfeasance in the obligation, expenditure, receipt, or use of state funds, or into specified financial transactions or practices that may involve such impropriety, malfeasance, or nonfeasance.

Gov’t Code § 321.0136.

We have reviewed the submitted information. The requested information deals primarily with the personnel matters of the commission. We do not believe that the information constitutes “audit working paper[s]” as contemplated in Government Code section 552.116 or section 321.001. See Gov’t Code §§ 321.0131-.016 (defining state audits and investigations); Open Records Decision No. 580 at 9-10 (1990). Accordingly, the commission may not withhold the requested information based on section 552.116 of the Government Code.

You next claim that other marked parts of the requested investigation material is excepted from disclosure by section 552.102 of the Government Code. Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Common-law privacy excepts from disclosure private facts about an individual. *Id.* 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). We have examined the investigation material and do not believe that

any information is protected from disclosure by a right of privacy. Open Records Decision No. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987).

You also argue that portions of the investigation file must be withheld under section 552.101. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You have marked the information in the submitted materials you claim is protected by statute. Section 111.057 of the Human Resources Code provides for the confidentiality of certain information held by the commission. The statute provides:

(a) Except for purposes directly connected with the administration of health and human service programs and in accordance with regulations, it is unlawful for a person to solicit, disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any list of, names of, or any information directly or indirectly derived from records concerning persons applying for or receiving health and human services.

(b) The commission is authorized to provide client and other information to and receive client and other information from any state agency for the purpose of increasing and enhancing services to clients and improving agency operations, except where federal law or regulations preclude such sharing.

(c) The commission shall adopt rules to carry out the purposes of this section.

Human Res. Code §111.057. The commission must withhold any information in the requested material that would identify any person applying for or receiving health and human services from the commission or as your agency rules provide. Additionally, you must withhold any information directly or indirectly derived from records concerning persons applying for or receiving health and human services. Notwithstanding this provision, section 111.057 does not protect the requested documents in their entirety. Thus, we will consider your additional arguments against disclosure or the remaining information.

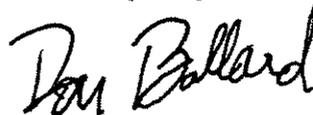
You next claim that section 552.101 excepts from disclosure criminal history report information ("CHRI"). The commission is authorized to receive certain criminal conviction record information. Human Res. Code § 111.058. The information that the commission obtains under section 111.058 must be treated as "privileged and confidential and for commission use only." Human Res. Code § 111.058(b). Furthermore, federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information

disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, any CHRI in your possession that falls within the ambit of these state and federal regulations must be withheld.

We also recognize that some other information within the materials may be protected from disclosure by section 552.117 of the Government Code. Portions of the requested material includes the home address, phone number, social security number and family information of current or former commission officials or employees. It is possible that this information may be confidential under section 552.117 of the Government Code, and therefore, this information, depending on the specific circumstances, may not be released. Section 552.117 of the Government Code requires you to withhold the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989).

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,



Don Ballard
Assistant Attorney General
Open Records Division

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Ref.: ID# 118769

Enclosures: Submitted Information

cc: Ms. Terry Edmond
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Austin, Texas 78752
(w/o enclosures)