



June 8, 2001

Ms. Peggy D. Rudd
Director and Librarian
Texas State Library and Archives
Commission
P.O. Box 12927
Austin, Texas 78711-2927

Open Records Decision No. 674

Re: What procedures should the Texas State Library and Archives Commission follow in making available for public inspection archived records if the records contain information that may be confidential by law? (ORQ-59)

Dear Ms. Rudd:

On behalf of the Texas State Library and Archives Commission (the "commission"), Mr. Christopher LaPlante, Director of the commission's Archives and Information Services Division, requested a decision from this office as to what procedures the commission should follow in making available for public inspection archival state records if the records contain information that may be confidential by law. We are informed that the commission has not received a request from the public to inspect such records. Rather, it is the commission's desire to be prepared for requests when they are received.¹

By way of background, the records at issue here are held by the commission's Archives and Information Services Division (the "archives division"). Pursuant to section 441.181 of the Government Code, the archives division takes legal custody of state records that are determined to possess sufficient value to warrant continued preservation in the state archives. The state archivist identifies and designates state records of archival value prior to their destruction in accordance with state records retention schedules and arranges for their transfer to the commission's custody in accordance with section 441.186(b) of the Government Code.²

Section 441.180 of the Government Code provides that an "[a]rchival state record" means a state record of enduring value that will be preserved by the commission on a continuing basis until the state archivist indicates that the record no longer merits further retention. Pursuant to section 441.193(a) of the Government Code, "[a]ll archival state records transferred to the custody of the commission . . . become the property of the commission." *But see* Gov't Code § 441.193(g) (public access to state records of other state agencies in the physical custody of the records management program of the commission shall

¹Accordingly, we issue this decision pursuant to section 402.042 of the Government Code.

²Under section 441.186(c), the inspection of a state record by a state archivist for the purpose of determining if it has archival value is not a release of a record to a member of the public under the Public Information Act, chapter 552 of the Government Code.

be denied unless the state agency having legal custody of the records provides written authorization); Open Records Decision No. 617 (1993) (commission's Records Management Division serves as warehousing facility and state agencies retain legal custody of documents stored in the Records Management Division). Therefore, in contrast with records held by the commission's Records Management Division, the commission's Director and Librarian is the public information officer with respect to archival state records transferred to the commission's custody in accordance with section 441.186(b) of the Government Code. *See* Open Records Decision No. 617 (1993) (Director and Librarian of commission is not the public information officer with respect to records of state agency held in the Records Management Division as part of that agency's records management program).

Section 441.193(c) of the Government Code dictates that the commission shall adopt rules regarding public access to the archival state records in its possession. Importantly, any such rules may not violate the requirements of chapter 552 or any other state law regarding public access to state records. Gov't Code § 441.193(d). Furthermore, section 441.193(f) charges the commission with ensuring the confidentiality established under chapter 552 or any other state law of any archival state record transferred to the commission's custody. Accordingly, the commission's administrative rules provide that "[t]he Commission's policy is to comply in spirit as well as technically with the [Public Information Act] and directs its staff to fully disclose any public information that may be requested." 13 T.A.C. § 2.4(d).

We are informed that appointment files of other governmental bodies are among the documents collected and preserved by the archives division, and that these files contain personal information regarding potential appointees to Texas boards and commissions that may be confidential under section 552.101 or 552.117 of the Government Code. We were provided a sample of the records at issue, and we are asked the extent to which section 552.101 or 552.117 applies to the information contained in these samples. Initially, we note that "section 552.221(a) requires the release of information not excepted from required disclosure as soon as possible under the circumstances, that is, within a reasonable time, without delay." Open Records Decision No. 664 at 1 (2000). In other words, the commission must release any information that it recognizes as not being excepted from disclosure under the Public Information Act (the "Act") as soon as reasonably possible after a written request is received. In order to do so, the commission must make an initial good faith determination of whether the appointment files at issue, or any other archival documents transferred into its custody in accordance with section 441.186(b) of the Government Code, contain confidential information that must be withheld from disclosure. Documents that do not contain information excepted from public disclosure must be released to the requestor as soon as reasonably possible after a written request for the records is received. If the commission determines in good faith that information responsive to a request is or may be confidential, the commission must seek an attorney general decision

before the information at issue can be released to the public.³ Gov't Code §§ 552.301, .352. In order to assist the commission's initial good faith determination of whether the type of archival state records at issue contain confidential information, this decision addresses the mandatory exceptions under the Act that are implicated by the submitted sample documents.⁴ In the process, we address the commission's inquiry of whether the following types of information contained in the submitted samples are excepted from disclosure: social security numbers, home addresses, names of spouses, number and ages of children, religious affiliation, organizational memberships, type of business or profession, and physical impairments.

Section 552.117(1) applies to current or former officials or employees of a governmental body⁵ and excepts from disclosure the employee's or official's home address, home telephone number, social security number, and information that reveals whether the individual has family members. Section 552.117(1) protects this information to the extent that the individual requested that the information be kept confidential in accordance with section 552.024.⁶ We are asked whether the commission must withhold the types of information described in section 552.117 where the information pertains to individuals who were either (1) not appointed to or employed by a governmental body, or (2) appointed to or employed by a governmental body other than the commission.

³ We are advised that the commission engages in a practice of screening archival state records upon their transfer to the commission's custody, and redacting from those records information that *may be* confidential. The redacted versions are then made readily available to the public, while the unredacted versions are not readily available to the public and must be requested from an archivist. We find that such a practice ensures that the commission promptly makes available to the public information that clearly is not excepted from public disclosure, while at the same time prevents the inadvertent release of confidential information. Where the commission receives a written request for such records, thereby implicating the requirements of the Public Information Act, we note that section 552.222(b) permits the commission to discuss with the requestor the scope of the request, *i.e.* whether the request encompasses the redacted information that may be confidential. If the requestor agrees that the request does not encompass the redacted information, we advise that the commission may withhold the information — without the necessity of seeking a decision from this office — because the redacted information would not be responsive to the request.

⁴ The exceptions to disclosure under the Act can generally be considered to fall within two categories: (1) "mandatory exceptions," which protect information deemed confidential by law and which a governmental body is prohibited from releasing subject to criminal penalties, Gov't Code § 552.352; and, (2) permissive or discretionary exceptions. A governmental body has the discretion to release to the public information for which it may otherwise assert a permissive or discretionary exception. *See id.* § 552.007; Open Records Decision No. 665 at 2 n.5 (2000) (addressing distinction between mandatory and discretionary exceptions to disclosure). As the commission's inquiries and the submitted information implicate only mandatory exceptions, this decision does not address the applicability of discretionary exceptions to information obtained by the commission in accordance with section 441.186(b) of the Government Code.

⁵ A governmental body as that term is defined in section 552.003 of the Government Code. *See* Gov't Code § 552.003(1)(A), (B).

⁶ None of the submitted samples appear to contain information that implicates the remaining subsections of section 552.117. *See* Gov't Code § 552.117(2), (3), (4).

We first note that section 552.117 does not apply to *applicants* for governmental employment or appointment, but to employees or appointees hired by a governmental body. See Open Records Decision No. 455 at 2 (1987). Thus, in answer to the first inquiry above, if a potential appointee was not appointed to or employed by a governmental body, section 552.117 does not except from disclosure information pertaining to the potential appointee.

The second inquiry above requires a more detailed analysis. A governmental body is normally obliged under section 552.117 to protect only information pertaining to employees and officials of that governmental body. The companion provision to section 552.117(1), section 552.024, provides that each employee or official of a governmental body may choose to deny public access to the person's section 552.117 information "in the custody of the governmental body." Gov't Code § 552.024(a). Moreover, the legislature has established no mechanism for a governmental body's appraising itself of whether given individuals are or were officers or employees of another governmental body, and if so, of such individuals' section 552.024 election. Thus, the Act does not normally require a governmental body to protect section 552.117 information of individuals who are not and have never been officials or employees of that governmental body. However, this office has also acknowledged that confidential information may be transferred between governmental bodies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. See Attorney General Opinions H-836 (1976), H-242 (1974), M-713 (1970); Open Records Decision Nos. 667 (2000), 661 (1999), 655 (1997), 414 (1984). We refer to this principle as the intergovernmental transfer doctrine. In this instance, pursuant to this doctrine, if the archival state records contain information that was protected under section 552.117 at the time the records were in the custody of the originating governmental body, the section 552.117 information remained confidential upon its transfer to the commission. We therefore next address the extent to which the information in the submitted samples may have been protected under section 552.117 while in the custody of the originating governmental body.

Our review of the submitted samples and the commission's representations indicate that, except for one sample, all of the sample records at issue were originally in the custody of the Governor's office. Even assuming the potential appointees were in fact appointed to or employed by a governmental body, we have no indication that the governmental body that employed any of the potential appointees was the Governor's office.⁷ Thus, none of the

⁷The personal information at issue pertains to individuals who were or may have been appointed to or employed by the Commission on Jail Standards, the Texas Education Agency, the Texas Amusement Machine Commission, the State Commission for the Blind, the Texas Committee on Purchases of Products and Services of Blind and Severely Disabled Persons, the Texas Commission on Alcohol and Drug Abuse, the

personal information in these samples was protected under section 552.117 at the time the records were in the custody of the Governor's office. Because the information was not protected under section 552.117 when it was in the custody of the originating governmental body, the information is likewise not protected under section 552.117 upon its transfer to the commission's custody.

One of the submitted samples, however, appears to have been transferred to the commission from the Texas State Board of Plumbing Examiners (the "board"). This sample contains the home address of a board member. If the board member filed an election with the board under section 552.024 to keep confidential his home address, this information in the custody of the board was confidential under section 552.117(1). Further, pursuant to the intergovernmental transfer doctrine discussed above, the information remains confidential upon the record's transfer to the commission's archives division. Thus, in order to ascertain whether the information is confidential and cannot lawfully be released to the public, the commission must inquire with the board as to whether the individual elected under section 552.024 to keep confidential his home address. If so, the individual's home address contained in the submitted sample is excepted from disclosure under section 552.117(1).

In summary, home addresses, home telephone numbers, social security numbers, and information that reveals whether an individual has family members that is contained in archival state records is excepted from disclosure under section 552.117 to the extent the originating governmental body employed the individual and the information was protected under section 552.117 while in the custody of that governmental body. In order to know and protect the confidentiality of such information, the commission must inquire with the originating governmental body to determine the extent to which section 552.117 is applicable.⁸

Although, as explained above, a social security number in an archival state record may not be confidential under section 552.117 of the Government Code, such information may nevertheless be confidential under federal law. 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 other statutes. This office has determined that a social security number or "related record" is excepted from required public disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after*

Structural Pest Control Board, and the Second District Court of Appeals.

⁸Of course, if the records at issue contain a copy of an election made by a public employee or official under section 552.024 of the Government Code, the commission may rely on that election. We are advised, however, that the section 552.024 elections are not normally transferred to the custody of the commission.

October 1, 1990. See Open Records Decision No. 622 (1994). The commission has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the commission to obtain or maintain the social security numbers contained in the submitted samples. But this does not end our inquiry. As with information protected under section 552.117, pursuant to the intergovernmental transfer doctrine, information that was protected under section 552.101 in the custody of the originating governmental body remains confidential in the custody of the commission's archives division. Therefore, a social security number in an archival state record that was obtained or maintained by the originating governmental body pursuant to any provision of law enacted on or after October 1, 1990, under section 405(c)(2)(C)(viii)(I) remains confidential upon its transfer to the commission. We are advised with respect to the submitted samples that the commission is not aware of and has not been informed of any law, enacted on or after October 1, 1990, which authorized the originating governmental body to obtain or maintain the submitted social security numbers. Where it is not apparent that a social security number was originally obtained or maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990, there would be no basis for concluding that such social security number is confidential under section 405(c)(2)(C)(viii)(I). However, we caution the commission that section 552.352 imposes criminal penalties for the release of confidential information. We therefore advise that prior to releasing a social security number contained in an archival state record, the commission should ensure that the number was not obtained or maintained by the commission, or by the governmental body from which the social security number was transferred, pursuant to any provision of law enacted on or after October 1, 1990.

We are also asked whether section 552.101 in conjunction with a right of privacy applies to any of the above-stated categories of information contained in the submitted samples. As noted above, section 552.101 excepts from disclosure "information considered to be confidential by . . . judicial decision." The Texas Supreme Court held that information is protected by common law privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).⁹

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 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related

⁹ In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

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)).

From our review of the submitted materials, we conclude that they do not contain any information that implicates either common law or constitutional rights of privacy. More specifically, information regarding an individual's profession or business, organizational memberships, or religious affiliation is not private information, and the commission may not withhold this type of information from public disclosure. Further, this office has found that the following types of information are not excepted from required public disclosure under common law privacy: age, salary, title, and date of employment, Open Records Decision Nos. 455 (1987), 373 (1983); licenses, certificates, and professional awards, Open Records Decision Nos. 444 (1986), 342 (1982); educational background and training, Open Records Decision Nos. 455 (1987), 444 (1986); past work history, Open Records Decision No. 455 (1987), 444 (1986); names, addresses, and telephone numbers of job references, Open Records Decision No. 455 (1987); performance evaluations, Open Records Decision Nos. 470 (1987), 400 (1983); and reasons for a public employee's demotion, dismissal, or resignation, Open Records Decision Nos. 444 (1986), 329 (1982), 278 (1981).

We note that some of the submitted sample documents, which contain potential appointees' biographical information, include a blank that allows individuals to list their "physical disabilities." These sample documents do not, however, reveal that any of the potential appointees have a disability, nor do they indicate the nature of any physical disabilities. Thus, there is no need to withhold any of the submitted information as pertaining to an individual's physical disabilities. The commission must, however, seek an attorney general decision with respect to any documents that do contain information responsive to a request under the Act and that pertains to an individual's physical disability or medical condition as this type of information may be excepted from public disclosure under section 552.101. Decisions regarding the private nature of this type of information must be made on a case-by-case basis.

Finally, we note that certain information contained in the submitted sample documents is excepted under section 552.130 of the Government Code. Section 552.130 provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if the information relates to:
 - (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

Therefore, Texas driver's license numbers contained in archived state records, such as those in the submitted samples, would be excepted from disclosure pursuant to section 552.130.

In summary, in order to both promptly release information that clearly is not excepted from public disclosure and to restrict public access to confidential information, the commission must make an initial good faith determination of whether particular information contained in archival state records is confidential. In light of the above discussion regarding the applicability of mandatory exceptions to the information contained in the submitted sample documents, the commission must make appropriate inquiries of the originating governmental body to determine the extent to which the information is or may be confidential. For any information in the custody of the archives division that the commission reasonably believes in good faith to be confidential, the commission must restrict public access to such information in compliance with section 552.352 of the Government Code and other applicable law. Further, if the information is responsive to a request under the Act, the commission must withhold the information at issue and seek a decision from this office in accordance with section 552.301 of the Government Code.¹⁰

¹⁰Pursuant to section 552.301(a), the commission is not required to request a decision from this office if a previous determination is applicable to the information at issue. *See* Open Records Decision No. 673 (2001).

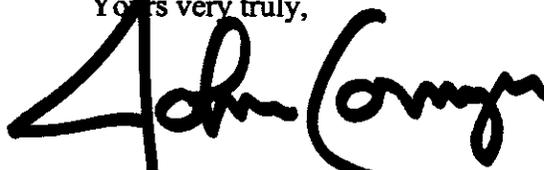
S U M M A R Y

The Director and Librarian of the Texas State Library and Archives Commission is the public information officer for archival state records transferred to the commission's custody under section 441.186(b) of the Government Code.

Information in archival state records that was confidential in the custody of the originating governmental body remains confidential upon transfer to the commission. The commission must make appropriate inquiries with the originating governmental body in order for the commission to maintain the confidentiality of such information.

If the commission reasonably believes in good faith that information in archival state records is confidential and such information is requested under the Public Information Act, the commission must seek a decision from this office in accordance with section 552.301 of the Government Code.

Yours very truly,

A handwritten signature in black ink, appearing to read "John Cornyn". The signature is stylized and cursive, with the first name "John" written in a larger, more prominent script than the last name "Cornyn".

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