



August 13, 2001

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department Of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-3542

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150658.

The Texas Department Of Human Services (the "department") received a request for 14 categories of information. The request encompasses personnel information pertaining to three named department employees, information pertaining to certain named benefit recipients, and information relating to an investigation of a named employee. You inform us that a portion of the information will be released to the requestor, but claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.117 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that section 552.022 of the Government Code makes certain information expressly public and therefore not subject to discretionary exceptions to disclosure. Section 552.022 provides in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108" Gov't Code § 552.022(a)(1). You identify the information you have submitted in folders marked numbers 8, 9, 10, 13 and 14 as investigation and dismissal documents. Further, it is clear that the subject investigation is complete. We therefore find that the information in these folders is subject to section 552.022(a)(1), and therefore, as prescribed by section 552.022, this information must be released to the requestor unless it is confidential under other law. You argue that the information is excepted under section 552.101 in conjunction with sections 12.003 and 21.012 of the Human Resources Code. As these statutes are "other law" for purposes of section 552.022, we will address your arguments under these statutes for the information in folders marked numbers 8, 9, 10, 13 and 14, as well as for the information in folders marked 1, 2, 3, 4, 6, 7, 11, and 12.

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. You claim that sections 12.003 and 21.012 of the Human Resources Code make confidential a portion of the submitted information. Section 12.003 of the Human Resources Code provides:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information concerning*, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties. [Emphasis added.]

In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (department shall provide safeguards restricting use or disclosure of information concerning applicants for or recipients of department's assistance programs to purposes directly connected with administration of programs); Open Records Decision No. 166 (1977).

It appears that release here is not for purposes directly connected with the administration of DHS's assistance programs. Consequently, we agree that you must withhold from disclosure in its entirety the information you have marked in the submitted documents contained in

folders 4, 6, 7, 11, and 12, under section 552.101 of the Government Code in conjunction with sections 12.003 and 21.012 of the Human Resource Code. We also find that most of the information you have marked in folders 1, 2, and 3 as falling within sections 12.003 and 21.012 of the Human Resources Code is protected by this statute and section 552.101. You must withhold this information except where we have marked "release" with blue flags. We have also marked with blue flags additional information in folders 1, 2, and 3 that must be withheld under sections 12.003 and 21.012 of the Human Resources Code and section 552.101. We further find that most of the information in folders 8, 9, 10, 13 and 14 is also confidential under sections 12.003 and 21.012 of the Human Resources Code and must therefore be withheld under section 552.101. However, we believe that a portion of this information does not come within the ambit of sections 12.003 and 21.012 of the Human Resources Code. For that information, which we have marked with a green flag, we note that you make a general argument that the information in folders 8, 9, 10, 13 and 14 is confidential under common law privacy, the informer's privilege, 42 U.S.C. § 405(c)(2)(C)(viii)(I), and Government Code sections 552.117 and 552.130. We will address your arguments for this information.

You claim that some of the requested information is protected from disclosure under the informer's privilege. The informer's privilege, as incorporated into the Public Information Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928); *see also Roviario v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviario* exists to protect a governmental body's interest. Therefore, the informer's privilege under *Roviario* may be waived by a governmental body and is not "other law" that makes the information confidential under section 552.022. *See Open Records Decision No. 549 at 6 (1990)*.

However, the informer's privilege is also found in Rule 508 of the Texas Rules of Evidence. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information in question is confidential under Rule 508.

Rule 508 provides in relevant part:

- (a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

Thus, an informer's identity is confidential under Rule 508 if a governmental body demonstrates that an individual has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation, and the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 508(c). In this case, you have not identified the individuals whose identities you believe are protected by the informer's privilege, nor have you identified any specific law which you believe has been violated. Therefore, we do not believe you have established that the identities of any individuals who furnished information are protected under the informer's privilege as stated in Rule 508 of the Texas Rules of Evidence.

Section 552.101 also encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication 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, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, 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.

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 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, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Therefore, the fact that an employee participates in a group insurance plan funded by a governmental employer and the amount of any payroll deduction therefor is not information that is excepted from disclosure. Open Records Decision No. 600 at 9 (1992). On the other hand, information relating to an employee's choice of insurance carrier and his election of optional coverages is confidential under the right of privacy, *id.* at 10-11. Similarly, this office has determined that information revealing the personal financial decision to voluntarily have certain deductions made from an employee's paycheck meets the *Industrial Foundation* test. Open Records Decision No. 545 (1990).

We find that none of the information to be released from folders marked 8, 9, 10, 13 and 14 is protected by common law privacy. However, most of the information you have marked in folders 1, 2, and 3 is protected by common law privacy, except the information we have marked. In addition, we have also marked with red flags other information in folders 1, 2, and 3 that is protected by common law privacy. We also note that the submitted information contains employee W-4 forms. Employee W-4 forms are excepted from disclosure by section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992).

We also agree that you must withhold the information you have marked under section 552.117. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The department may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked with a yellow flag additional information that must be withheld under section 552.117 if a timely election was made.

In the event the employees whose information is at issue did not timely make the section 552.024 election referred to above, we note that a social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 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 October 1, 1990. *See* Open Records Decision No. 622 (1994). Therefore, prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license numbers you have marked under section 552.130.

Finally, with regard to the information coming within the ambit of sections 552.101, 552.117 and 552.130 that relates to the client of the requestor, we note that section 552.023 of the Government Code gives a person or a person's authorized representative a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from disclosure by laws intended to protect that person's privacy interest. If the attorney in this case is the authorized representative of the person to whom the protected information pertains, then the department must release the information protected by section 552.101, 552.117 and 552.130 to the attorney under section 552.023.

To summarize, the information you have submitted in folders 8, 9, 10, 13 and 14 is public under section 552.022(a)(1). However, much of this information is excepted from disclosure under sections 12.003 and 21.012 of the Human Resource Code and must be withheld under section 552.101. The information to be released from folders 8, 9, 10, 13 and 14 has been marked with green flags.¹ In addition, the department must withhold from disclosure in its entirety the information you have marked in the submitted documents contained in folders 4, 6, 7, 11, and 12 under section 552.101 of the Government Code in conjunction with sections 12.003 and 21.012 of the Human Resource Code. The department must also withhold a portion of the information you seek to withhold in folders 1, 2, and 3 under

¹Please note that within the green-flagged documents to be released, we have marked certain information with blue flags that must be withheld under sections 12.003 and 21.012 of the Human Resources Code in conjunction with section 552.101.

section 552.101 in conjunction with sections 12.003 and 21.012 of the Human Resource Code. We have marked with blue flags additional information in folders 1, 2, and 3 that must be withheld under sections 12.003 and 21.012 of the Human Resource Code, as well as information you have marked under these statutes that must be released. Most of the information you have marked in folders 1, 2, and 3 must be withheld under common law privacy and section 552.101, except for the information we have marked. We have marked with a red flag additional information in folders 1, 2, and 3 that must be withheld under section 552.101 in conjunction with common law privacy. The department may only withhold the information it has marked under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We have marked with yellow flags additional information that may be protected under section 552.117. Driver's license information must be withheld under section 552.130. If the attorney in this case is the authorized representative of the person to whom the protected information pertains, then the department must release the information protected by section 552.101, 552.117 and 552.130 to the attorney under section 552.023. The rest of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 150658

Enc. Submitted documents

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