



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 14, 2005

Ms. Natalia Luna Ashley  
Assistant General Counsel  
Texas Ethics Commission  
P.O. Box 12070  
Austin, Texas 78711-2070

OR2005-05227

Dear Ms. Ashley:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID#225994.

The Texas Ethics Commission (the "commission") received a request for the personnel file of a named former employee. You state that you have provided most of the requested information to the requestor but claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the commission's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body that receives a written request for information that it wishes to withhold from disclosure pursuant to an exception under the Act must ask for an attorney general decision no later than ten business days after the date of receiving the written request. *See* Gov't Code § 552.301(a), (b). You state the commission received the present request on March 23, 2005. Accordingly, the commission was required to request a decision from this office, stating the exceptions that apply, no later than April 6, 2005. We received the commission's request for a decision via interagency mail on April 7. *See* Gov't Code § 552.308(b) (deadline met if state agency sends submission via interagency mail and provides evidence sufficient to establish submission was deposited in interagency mail within 10-day period). You have not provided "evidence sufficient to establish" commission requested the ruling within the ten business

day period. We therefore find the commission failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Section 552.101, which encompasses "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," generally can provide a compelling reason to overcome the presumption of openness. *See Open Records Decision No. 630 (1994)* (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Because sections 552.101 and 552.117 can provide compelling reasons to overcome the presumption of openness, we will address the applicability of these exceptions to the submitted information.<sup>1</sup>

Next, we note that you have redacted information in the documents at issue. You do not assert, and our review of our records does not indicate, that you have been authorized to withhold any such information without seeking a ruling from this office. *See Open Records Decision 673 (2000)*. Because we can discern the nature of most of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld, and leaves this office with no alternative other than ordering that the redacted information be released. *See Gov't Code §§ 552.301(e)(1)(D)* (governmental body must provide this office with copy of "specific information requested" or representative sample), 552.302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by the common-law right to privacy. Information is protected from disclosure by the common-law right to privacy 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. *See id.* 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

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<sup>1</sup> The Office of the Attorney General will raise mandatory exceptions to disclosure on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683.

This office has found that the following types of information are excepted from required public disclosure under 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. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history); and certain personal choices relating to financial transactions between the individual and the governmental body, *see* Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). After reviewing the remaining submitted information, we find that portions are protected from disclosure under the common-law right to privacy. We have marked the information that the commission must withhold pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Portions of the submitted records, not otherwise excepted from disclosure, contain information that may be excepted under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former 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(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). To the extent the named employee timely elected confidentiality under section 552.024, the submitted personal information must be withheld under section 552.117(a)(1).

In summary, the commission must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The submitted personal information must be withheld under section 552.117(a)(1) to the extent it applies. The remaining 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/seg

Ref: ID# 225994

Enc. Submitted documents

c: Ms. Sally Pena  
12111 Mill Hollow Cove  
Austin, Texas 78750-1438  
(w/o enclosures)