



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 9, 2009

Ms. Zindia Thomas
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2009-00371

Dear Ms. Thomas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 330588 (PIR Nos. 08-23496 & 08-23497).

The Office of the Attorney General (the "OAG") received requests for information pertaining to the two requestors and their terminations from the El Paso Medicaid Fraud Control Unit (the "MFCU"). However, the OAG withdrew its request for a decision as to Guadalupe Macias' request because the requestor withdrew her request for information by operation of law. *See* Gov't Code § 552.2615. As for the remaining request, the OAG states it will release some information and asserts the remainder is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.137, and 552.147 of the Government Code. We have considered the OAG's claimed exceptions to disclosure and have reviewed the submitted sample of information.¹

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

First, the OAG informs us Exhibit C is a completed investigation and we note Exhibit D is a completed report, both of which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides a completed investigation or report is public information unless it is confidential by other law or excepted from disclosure under section 552.108. Gov't Code § 552.022(a)(1). Section 552.103 is a discretionary exception and does not make information confidential; therefore, the OAG may not withhold Exhibits C and D under this exception. Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (section 552.103 may be waived). Sections 552.101, 552.117, and 552.137 are other laws for purposes of section 552.022.² Therefore, we will consider the OAG's assertions under these exceptions as well as section 552.108 for Exhibits C and D.

Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), .301(e)(1)(a); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

The OAG argues section 552.108(a)(1) is applicable because the information it marked relates to pending criminal investigations conducted by the MFCU. After review of the information, we conclude the OAG may withhold the information it marked under section 552.108(a)(1). See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Section 552.108(b)(2) excepts from disclosure an internal record of a law enforcement agency that relates to an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(b)(2) must demonstrate that it is a law enforcement agency and the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

The OAG argues section 552.108(b)(2) is applicable to the portions it marked because the criminal investigations conducted by the MFCU resulted in conclusions other than conviction or deferred adjudication. The submitted Ombudsman's complaint file is an internal record of MFCU, a law enforcement unit, that relates to a personnel matter that arose from MFCU's Medicaid fraud investigations. Because the allegations against MFCU's investigators relate

²The common-law informer's privilege, which you raise, is other law for the purpose of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm'n on Env'tl. Quality v. Abbott*, No. GN-204227 (126th Dist. Ct., Travis County, Tex.).

to criminal investigations, and are not solely personnel matters, we conclude the OAG may withhold some of the information it marked under section 552.108(b)(2).

Next, the OAG asserts the "work product privilege" under subsections 552.108(a)(4) and (b)(3). These subsections provide:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Although the OAG asserts release of the marked information would reveal "the mental impressions and legal reasoning of the MFCU attorneys and MFCU employees handling these cases," our review shows the marked information does not reveal

the mental impressions or legal reasoning of the prosecutor handling the case. In addition, by its plain language, subsections 552.108(a)(4)(B) and (b)(3)(B) except from disclosure the mental impressions of the prosecutor only, not any other employees. Thus, the OAG may not withhold the information it marked under these subsections.

Next, we consider the OAG's common-law privacy argument for portions of the information it marked in Exhibits C and D. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The types 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. In addition, the identities of the victims and witnesses to alleged sexual harassment are protected by common-law privacy. *Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.—El Paso 1992, writ denied). After review of the information, we conclude the information the OAG marked in Exhibit C is not protected under common-law privacy because the identity of the person whose information is at issue is otherwise protected. As for the information the OAG marked in Exhibit D, the complainants did not allege behavior that constitutes sexual harassment. Thus, the OAG may not withhold any information it marked in Exhibits C and D under common-law privacy.

The OAG asserts the informer's privilege, which Texas courts have recognized, for the information it marked in Exhibit D. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). Although the OAG asserts the information it marked reveals "an informer of alleged Medicaid fraud," our review of the information shows it neither reveals the identity of an informer nor an allegation of Medicaid fraud. Thus, we conclude the OAG may not withhold the information under section 552.101 in conjunction with the informer's privilege.

Next, we address the OAG's assertion under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) 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 of the Government Code. 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 OAG may only withhold information 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. For those employees who timely elected to keep their personal information confidential, the OAG must withhold most of the employees' information it marked and as we marked in Exhibits C and D. The OAG may not withhold this information under section 552.117(a)(1) for those employees who did not timely elect to keep the information confidential.

The OAG asserts the private e-mail address it marked in Exhibit C is excepted from disclosure under section 552.137. Section 552.137 provides an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure. Gov't Code § 552.137(a). However, a private e-mail address may be disclosed if the member of the public affirmatively consents to its release. *Id.* § 552.137(b). Thus, because the e-mail address the OAG seeks to withhold belongs to the requestor, the OAG must release it to her.

Lastly, we consider the OAG's section 552.103 assertion for Exhibit E. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The OAG has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The OAG must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has stated that a pending complaint with the Equal Employment Opportunity Commission ("EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). The OAG explains that prior to its receipt of the request for information, two former employees filed EEOC complaints against it for discrimination and civil rights violations. Thus, we agree the OAG has shown that litigation is reasonably anticipated. Our review of Exhibit E also shows the information is related to the anticipated litigation. Accordingly, the OAG may withhold Exhibit E pursuant to section 552.103.

We note that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the OAG may withhold Exhibit E pursuant to section 552.103. Pursuant to section 552.117(a)(1), the OAG must withhold the information it and we marked for those employees who timely elected to keep their personal information confidential. Also, the OAG may withhold the information it marked under subsections 552.108(a)(1) and 552.108(b)(2). The OAG must release the remainder.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

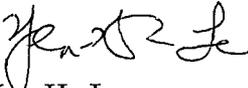
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas 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 Office of the Attorney General 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 330588

Enc: Marked documents

c: 2 Requestors
(w/o enclosures)