



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2009

Ms. Sandi P. Tarski
Walsh, Anderson, Brown, Aldridge & Gallegos, P.C.
P.O. Box 168046
Irving, Texas 75016

OR2009-10509

Dear Ms. Tarski:

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# 350761.

The La Marque Independent School District (the "district"), which you represent, received a request for (1) the sick leave and vacation time for the year 2009 for six named district employees, (2) attorney fee bills for two specified events, and (3) the financial report regarding a district fund-raising event. You state you have released information responsive to the requests for information regarding attorney fee bills and the fund-raising event. You state you will withhold social security numbers within the submitted information pursuant to section 552.147 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the instant request as it does not pertain to sick leave or vacation time for the year 2009 or it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

information in response to this request. Accordingly, we will address your arguments with regard to the responsive information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") HIPAA, 42 U.S.C. §§ 1320d-1320d-8, which you claim governs portions of the submitted information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts.160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision Number 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with, and is limited to, the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the district may not withhold the submitted information on this basis.

Section 552.102 of the Government Code 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 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 v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of

common-law privacy as incorporated by section 552.101 of the Act. *See Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citing *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976)). We will therefore address your common-law privacy claims under both sections 552.101 and 552.102 of the Government Code.

The doctrine of common-law privacy protects information if it: (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Industrial Foundation*, 540 S.W.2d at 685. 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. *Id.* at 683. However, the work conduct, job performance, and salary information of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow), 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private). In Open Records Decision No. 470 (1987), this office determined that, although the fact that a public employee is sick is public, specific information about illnesses is excepted from disclosure under common-law privacy. Open Records Decision No. 470 at 4; *see* Open Records Decision No. 455 at 9 (1987) (information regarding applicants' illnesses or operations and physical handicaps is intimate personal information). Upon review, we find the fact that an individual has taken sick leave or vacation time is not highly intimate or embarrassing. Further, no portion of the responsive information reveals the nature of an illness or any other private facts pertaining to the employees. *See* ORD 470 at 4. Therefore, you have failed to demonstrate how any portion of the responsive information is confidential under common-law privacy, and it may not be withheld under section 552.101 on that ground.

You also raise constitutional privacy under section 552.101 of the Government Code, which protects two kinds of interests: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of a personal matter. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig*

Village, Tex., 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). Upon review, we find you have failed to demonstrate the responsive information comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. Thus, no portion of the submitted information may be withheld under section 552.101 on the basis of constitutional privacy.

We note portions of the submitted information may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) 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 this information be kept confidential under section 552.024 of the Government Code. See Gov't Code § 552.117(a)(1). Whether 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). Pursuant to section 552.117(a)(1), the district must withhold the social security number, home address, home telephone number, and family member information of a current or former district employee who elected, prior to the district's receipt of the request for information, to keep such information confidential. We have marked the information that is subject to section 552.117(a)(1). If the employees at issue timely elected to withhold their personal information, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the employees at issue did not timely elect to withhold their personal information, the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

In summary, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code, if the employees to whom the information relates timely elected to keep such information confidential under section 552.024 of the Government Code. If the employees did not timely elect to keep such information confidential, it may not be withheld under section 552.117(a)(1) of the Government Code. The remaining responsive information must be released.

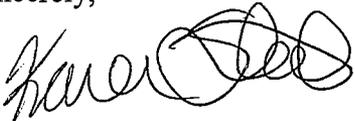
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen E. Stack". The signature is written in a cursive style with some loops and flourishes.

Karen E. Stack
Assistant Attorney General
Open Records Division

KES/cc

Ref: ID# 350791

Enc. Submitted documents

c: Requestor
(w/o enclosures)