



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 17, 2009

Ms. Janet Smith  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2009-13160

Dear Ms. Smith:

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# 355594.

The Texas Department of State Health Services (the "department") received a request for information relating to an investigation involving the requestor. You state that some of the requested information has been released. You claim that other responsive information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

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. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 48.101 of the Human Resources Code, which provides in part:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

- (1) a report of abuse, neglect, or exploitation made under this chapter;
- (2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

Hum. Res. Code § 48.101(a). You indicate that some of the submitted information is related to an investigation conducted by the Department of Family and Protective Services (the "DFPS") under chapter 48 of the Human Resources Code. Based on your representations and our review, we find that the information we have marked was used or developed in an investigation of alleged abuse, neglect, or exploitation under chapter 48. Thus, the marked information falls within the scope of section 48.101(a).

In this instance, however, the perpetrator of the alleged abuse, neglect, or exploitation is the requestor, who is a former employee of the department. Section 48.101(d) provides:

(d) The executive commissioner shall adopt rules providing for the release, on request, to a person who is the subject of a report of abuse, neglect, or exploitation or to that person's legal representative of otherwise confidential information relating to that report. The department or investigating state agency shall edit the information before release to protect the confidentiality of information relating to the reporter's identity and to protect any other individual whose safety or welfare may be endangered by disclosure.

*Id.* § 48.101(d). Pursuant to section 48.101(d), the department has adopted administrative rules regarding an employee's right of access to investigatory materials. Section 417.512(d) of title 25 of the Texas Administrative Code provides in part:

(d) When disciplinary action is taken against an employee based on confirmed abuse or neglect, the head of a facility notifies the employee in writing of the disciplinary action taken and any right to a grievance hearing the employee may have under [the department's] internal policies and procedures relating to employee grievances. If the employee files a grievance in response to disciplinary action resulting from confirmed abuse or neglect, the head of the facility, upon the employee's written request, provides the employee with a copy of or access to the investigative report.

25 T.A.C. § 417.512(d). You do not inform us either that disciplinary action has been taken against the requestor, based on confirmed abuse or neglect, or that the requestor has filed a grievance. The submitted request for information states that the request was made for the purpose of filing a grievance. Thus, because there is no indication that the requestor has filed a grievance with respect to the matter to which the submitted information pertains, we find that the requestor does not have a right of access under section 417.512(d) to the marked information that falls within the scope of section 48.101(a). We are not aware of any other

provision of the department's rules that would grant the requestor a right of access to the marked information. We therefore conclude that the department must withhold the marked information under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code.

You also contend that some of the remaining information is confidential under sections 711.607 and 711.613 of title 40 of the Texas Administrative Code. These sections are found in chapter 711 of the title 40 of the Texas Administrative Code, which governs records of DFPS investigations of mental health facilities. *See* 40 T.A.C. §§ 711.1, 711.5. Section 711.607 provides that in releasing the investigative report to the administrator, contractor CEO, or Consumer Rights and Services, the name of the reporter is released only in certain circumstances involving allegations of sexual exploitation. *See id.* § 711.607; *see also id.* § 711.3(35) (defining reporter as “[t]he person, who may be anonymous, making an allegation.”). Section 711.613 further describes the circumstances in which the investigative report may be released and provides that the report may be released to certain entities and individuals “with any information concealed that would reveal the identities of the reporter and any person served who is not the victim or alleged victim[.]” *See id.* § 711.613. You contend that the identities of employees who provided information during the course of an internal investigation by the department are confidential under sections 711.607 and 711.613. You do not inform us, however, and it does not otherwise appear that the employees in question provided information in connection with an investigation by DFPS under chapter 711 of title 40 of the Texas Administrative Code. Further, the information at issue does not consist of an investigation report generated by DFPS in an investigation under chapter 711 of title 40 of the Texas Administrative Code. We therefore conclude that the department may not withhold any of the remaining information under section 552.101 in conjunction with sections 711.607 and 711.613 of title 40 of the Texas Administrative Code.

Next, we address your other claims under section 552.101. This exception also encompasses the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects 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. *See* Open Records Decision Nos. 515 at 3 (1998), 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.” *See* 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). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

You contend that the identities of employees who provided information in connection with the internal investigation are protected by the common-law informer's privilege. You have not sufficiently demonstrated, however, that the employees in question reported violations of laws that are punishable by civil or criminal penalties. We therefore conclude that the department may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

You also raise section 552.101 in conjunction with constitutional and common-law privacy. Constitutional privacy protects two kinds of interests. 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 *Fadjo v. Coon*, 633 F.2d 1172 (5<sup>th</sup> 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 (5<sup>th</sup> 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 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

We have marked the names of patients of a mental health facility that the department must withhold under section 552.101 in conjunction with common-law privacy.<sup>1</sup> Although the department has marked other information that it seeks to withhold on privacy grounds, we note that the information in question is related to employees of the department and their conduct in the workplace. As this office has often stated, the public generally has a legitimate interest in information relating to public employees and public employment. See, e.g., Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in

---

<sup>1</sup>As we are able to make this determination, we need not address your claim for the patients' names under section 576.005 of the Health and Safety Code.

information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow). We therefore conclude that the department may not withhold any of the remaining information under section 552.101 in conjunction with constitutional or common-law privacy. *See also* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 329 at 1-2 (1982) (reasons for public employee's resignation ordinarily not protected by constitutional or common-law privacy).

Lastly, we address your claim under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of an official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of an official or employee who did not timely request under section 552.024 that the information be kept confidential. You state that some of the remaining information is related to employees of the department who requested confidentiality for the information in question prior to the department's receipt of the instant request for information. Based on your representations and our review of the information in question, we have marked information that the department must withhold under section 552.117(a)(1).

In summary: (1) the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 48.101 of the Human Resources Code and common-law privacy; and (2) the information we have marked under section 552.117 of the Government Code must also be withheld. The rest of the submitted information must be released.<sup>2</sup>

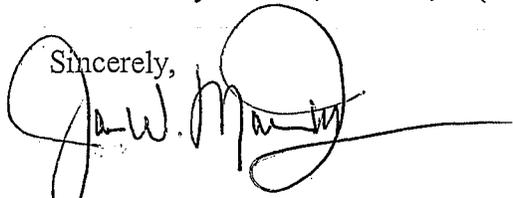
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

---

<sup>2</sup>We note that the department might ordinarily be required to withhold some of the remaining information to protect the requestor's privacy. The requestor has a right of access, however, to his own private information under section 552.023 of the Government Code. Should the department receive another request for these same records from a person who would not have a right to this requestor's private information, the department should resubmit these records and request another decision. *See* Gov't Code §§ 552.301, .302.

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 responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal flourish extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/cc

Ref: ID# 355594

Enc: Submitted documents

c: Requestor  
(w/o enclosures)