



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 9, 2010

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2010-05011

Dear Ms. McGowan:

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# 375856 (DISD ORR#s 9120 and 9136).

The Dallas Independent School District (the "district") received two requests for a specified report by the district's Office of Professional Responsibility. You state the district has made some of the information available to one of the requestors. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.102 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted information.

We note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed report made for or by the district. The district must release this information under section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Because sections 552.101 and 552.102 are other law for purposes of section 552.022, we will consider your arguments under these sections. We also note that the submitted report contains information that may be excepted from disclosure under section 552.117 of the Government Code, which is also other law for the purposes of

section 552.022. Furthermore, the Texas Supreme Court has held that the Texas Rules of Evidence are other law within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (Texas Rules of Evidence are "other law" within section 552.022). Accordingly, we will also consider whether the submitted information is privileged under Texas Rule of Evidence 503.

You claim the attorney-client privilege under Texas Rule of Evidence 503 for portions of the submitted information. Rule 503 enacts the attorney-client privilege and provides in part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is confidential if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall

within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend that the information you have marked consists of privileged communications between the district's representatives and legal counsel representing the district. You state that these communications were created for the express purpose of soliciting legal advice and legal interpretation of a particular issue. You state the information was not intended to be disclosed to third persons and that the district has not waived confidentiality. Based on your representations and our review of the information at issue, we conclude that the information you have marked may be withheld under Texas Rule of Evidence 503.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Gov't Code § 552.101. This section encompasses information protected by other statutes. You contend that a portion of the submitted information is subject to section 611.002 of the Health and Safety Code. Section 611.002 governs the public availability of mental health records, and provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining "patient" and "professional"). You state portions of the remaining information involve communications between an employee and a mental health professional and are therefore confidential pursuant to section 611.002. Upon review, we find that none of the remaining information constitutes mental health records. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses information protected by the Medical Practices Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find none of the remaining information consists of medical records that are subject to the MPA. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses the Americans with Disabilities Act (the "ADA"), which provides for the confidentiality of certain medical records of employees and applicants. Specifically, the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission determined medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). Upon review, we find the ADA is applicable to a portion of the remaining information, which we have marked. The district must withhold the information we have marked under section 552.101 in conjunction with the ADA. However, we find the district has failed to demonstrate the ADA is applicable to the remaining information, and none of the remaining information may be withheld on that basis.

Section 552.101 also encompasses information protected by common-law privacy. 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 that 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*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the district's section 552.102 claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

Common-law privacy protects information that (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. *Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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. *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), 545 (1990); and personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (finding personal financial information to include 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), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern); 542 (1990); 470 at 4 (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the information we have marked is intimate or embarrassing and not of legitimate public concern. Thus, the district must withhold the marked information under section 552.101 in conjunction with common-law privacy. However, you have failed to

demonstrate how any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, none of the remaining information is confidential under the doctrine of common-law privacy, and it may not be withheld under either section 552.101 or section 552.102 of the Government Code on that basis.

Section 552.101 also encompasses the doctrine of constitutional privacy. 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. *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 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. ORD 455 at 4. 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; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). Upon review, we find you have not demonstrated how any portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interest for the purposes of constitutional privacy. Accordingly, no portion of the remaining information may be withheld under section 552.101 in conjunction with constitutional privacy.

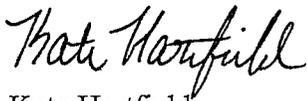
We note portions of the remaining information may be confidential under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* §§ 552.117(a)(1), .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). Accordingly, if the employees at issue timely elected to withhold personal information pursuant to section 552.024, the district must withhold the information we have marked under section 552.117 of the Government Code. The district may not withhold this information if the employees did not make timely elections to keep the information confidential.

In summary, the district may withhold the information you have marked under Texas Rule of Evidence 503. The district must withhold the information we have marked under section 552.101 in conjunction with the ADA. The district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The district must withhold the information we marked under section 552.117(a)(1) of the Government Code to the extent it pertains to current or former district employees who timely elected confidentiality. The remaining 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 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, toll free at (888) 672-6787.

Sincerely,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/dls

Ref: ID# 375856

Enc. Submitted documents

c: Requestors
(w/o enclosures)