



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 6, 2012

Mr. Jeffrey T. Pender
Deputy General Counsel
Texas Department of Housing and Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941

OR2012-01826

Dear Mr. Pender:

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# 444438.

The Texas Department of Housing and Community Affairs (the "department") received two requests from the same requestor for (1) the requestor's e-mail correspondence during a specified time period; (2) the information stored on her "P" drive; (3) her personnel file; (4) the most recent personnel handbook; and (5) documentation of an investigation that led to her resignation. You state some of the requested information either has been or will be released. You claim the submitted information is excepted from disclosure under section 552.116 of the Government Code. We have considered the exception you claim and reviewed the information you submitted. We also have considered the comments we received from the Texas State Auditor's Office (the "SAO"). *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note most of the submitted information consists of a completed investigation 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 excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" *Id.* § 552.022(a)(1). Although you raise section 552.116 of the Government Code, this is a

discretionary exception that may be waived and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.116 does not make information confidential for the purposes of section 552.022(a), and the department may not withhold the information subject to section 552.022(a)(1) under section 552.116. However, portions of this information are or may be subject to sections 552.101, 552.117 and 552.137 of the Government Code,¹ which do make information confidential under the Act. Thus, we will address the applicability of these exceptions, along with the argument under section 552.116 for the remaining 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. This exception encompasses common-law privacy, which 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 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 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 conclude some of the submitted information is highly intimate or embarrassing and not a matter of legitimate public interest. Therefore, the department must withhold that information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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 §§ 552.024, 117(a)(1). Whether a particular item 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). The department may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 of the Government Code prior to the date on which the request for the information was made. Thus, to the extent the individuals whose personal information is at issue timely requested confidentiality under section 552.024, the department must withhold the information we have marked under

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.117(a)(1) of the Government Code. To the extent the individuals did not make timely elections under section 552.024, the department may not withhold the marked information under section 552.117(a)(1).

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail address we have marked is not of a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless its owner has affirmatively consented to disclosure.² As no additional exceptions are raised for the completed investigation subject to section 552.022(a)(1), which we have marked, it must be released to the requestor.

We next address the argument against disclosure of the submitted information that is not subject to section 552.022. Section 552.116 of the Government Code provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution

²We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Id. § 552.116. You and the SAO assert the remaining information is subject to section 552.116 of the Government Code. We note the SAO is the independent auditor for Texas state government. The SAO has authority under section 321.013 of the Government Code to conduct investigations and audits of all state departments as specified in the audit plan or as directed by the Legislative Audit Committee. *See id.* § 321.013(a), (f). We understand the remaining information was created by the SAO in the course of an investigation of the department, and the SAO asserts the information constitutes audit working papers of the SAO. *See id.* §§ 321.0136 ("investigation" for purposes of chapter 321 of the Government Code is an inquiry into specified allegations of impropriety, malfeasance, or nonfeasance concerning state funds); 552.116(b)(1) ("audit" for purposes of section 552.116 includes an investigation). After reviewing the information at issue, we conclude the remaining information consists of an audit working paper of the SAO for purposes of section 552.116 of the Government Code. Therefore, the department may withhold the remaining information, which we have marked, under section 552.116.

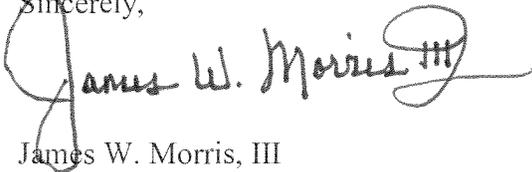
In summary, the department must release the information we have marked under section 552.022(a)(1) of the Government Code. In releasing that information, the department must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the information we have marked under section 552.117(a)(1) of the Government Code, to the extent the individuals whose personal information is at issue timely requested confidentiality under section 552.024 of the Government Code; and (3) the e-mail address we have marked under section 552.137 of the Government Code, unless its owner has consented to release. The department may withhold the remaining information under section 552.116 of the Government Code on behalf of the SAO.

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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large initial "J" and a stylized "M".

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

JWM/em

Ref: ID# 444438

Enc: Submitted documents

c: Requestor
(w/o enclosures)