



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 13, 1997

Mr. Steven C. Hilbig
Bexar County Criminal District Attorney
300 Dolorosa, Suite 5072
San Antonio, Texas 78205

OR97-0536

Dear Mr. Hilbig:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 104312.

You received a request for (1) an unredacted copy of your deposition from a sexual harassment lawsuit filed against your office, and (2) the reports and analyses of the overall results of a survey of your staff conducted by the Pierce Group. You previously released to the requestor a copy of your deposition with your comments about the survey redacted. Therefore, only those sections of the deposition concerning the survey are at issue here. You contend that protective orders make the survey and the redacted portions of the deposition confidential. In the alternative, you contend that the survey and redacted portions of the deposition are protected by common-law and constitutional privacy rights and that the survey is also excepted from disclosure under section 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

You contend that protective orders entered in *Gonzalez v. Bexar County*, No. SA-94-CA-0569 (W.D. Tex. filed Nov. 21, 1996), make the survey and the redacted portions of the deposition confidential and exempt from disclosure. Prior to submitting his open records request to you, the requestor intervened in the sexual harassment lawsuit and filed a motion seeking to have the protective orders vacated. In denying that motion, Judge Edward C. Prado ruled as follows:

As in Seattle Times, this Court's orders only prevent the parties from disseminating information obtained solely through pretrial discovery and do not prevent Intervenors from obtaining the information from some other source if available. 467 U.S. at 37. This type of pretrial restriction is not a violation of Intervenors' First Amendment rights [Footnote omitted]. Intervenors have also argued that they are entitled to production of the Survey and deposition under the Texas Open Records Act. That question is not relevant to this Court's consideration. This Court has never prevented Bexar County from releasing the Survey results if it so chooses. Similarly, District Attorney Hilbig is not restricted from authorizing the release of his deposition testimony. If Intervenors believe the information is required to be publicly released, then they may seek an order to that effect from the Texas courts.

Order Denying Motions By Way of Intervention, *Gonzalez v. Bexar County*, No. SA-94-CA-0569 (W.D. Tex. filed Nov. 21, 1996). It is clear from this ruling that the protective orders were not intended to shield the survey and deposition from disclosure under the Open Records Act. Therefore, we must address the exceptions to disclosure that you have raised.

The survey and redacted portions of the deposition involve "the feelings and opinions of employees of the District Attorney's office concerning their workplace environment and the policies of the District Attorney." For this reason, you assert that the employees have common-law and constitutional privacy rights in the survey. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrines of common-law and constitutional 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

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. Open Records Decision No. 455 (1987) at 4. 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. *Id.* 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 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or 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), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

We note that the requestor is “not asking for raw data, which could compromise the confidentiality of respondents, but for reports and analyses of the overall results of the survey.” Having reviewed the information responsive to the request, we conclude that it is not excepted from disclosure under section 552.101 in conjunction with common-law or constitutional privacy rights.

Finally, you assert that the survey is excepted from disclosure in its entirety under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 (1987) at 14, 298 (1981) at 2. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Section 552.111 does not, however, except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 (1993) at 4-5.

The survey at issue here is similar to the consultant’s report we considered in Open Records Decision No. 631 (1995). In that opinion, we ruled that information relating to the policymaking functions of a governmental body includes advice, recommendation, and opinions regarding administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *Id.* at 4. Based on the reasoning set out in Open Records Decision No. 631 (1995), we conclude that the recommendation and opinion portions of the requested sections of the survey are excepted from disclosure under section 552.111 of the Government Code. We note, however, that portions of the requested sections are purely factual and are, therefore, not excepted from disclosure under section 552.111. Open Records Decision Nos. 419 (1984) at 4 (statistical summaries of opinion survey results not excepted from disclosure by section 552.111), 209 (1978) at 2-3 (final compilation of objective responses to survey is factual). We have marked the factual portions accordingly.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination

regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 104312

Enclosures: Submitted documents

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