



Office of the Attorney General
State of Texas

November 18, 1997

DAN MORALES
ATTORNEY GENERAL

Mr. Stephen L. Enders
Director
West Texas Community Supervision and Corrections Department
County Archives Building
800 East Overland, Suite 100
El Paso, Texas 79901

OR97-2506

Dear Mr. Enders:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 110151.

The West Texas Community Supervision and Corrections Department (the "department") has received numerous requests for all information concerning the Promotional Oral Boards of March 17-18, April 11, and May 9, 1997. You argue that the scoresheets of those who competed for promotions must be withheld under section 552.101 because of a right of privacy.¹ You have submitted a sample of the documents you seek to withhold.²

Because you raise no exception to disclosure for the remaining requested information, including the names of the oral board members, and the names and resumes of the applicants,

¹You argue in your original correspondence to this office that the examination questions could be withheld. You have not, however, submitted any examination questions in your request for a decision nor do you reassert your contention in the department's subsequent letter to this office. Gov't Code §§ 552.301-303. Furthermore, it appears that you have released the examination's suggested questions and their suggested responses to at least one requestor. A governmental body may not practice selective disclosure. Open Records Decision Nos. 490 (1988), 464 (1987), 463 (1987), 192 (1978). Thus, you may not now withhold the released information from disclosure to the other requestors.

²In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

we presume that you have released this information to the requestors. See Open Records Decision Nos. 455 (1987), 439 (1986), 429 (1985). We note, however, that the requests for information also seek "employee performance evaluations." The Seventy-fifth Legislature amended section 76.006 of the Government Code to provide that "[a] document evaluating the performance of an officer of the department who supervises defendants placed on community supervision is confidential." Act of May 26, 1997, 75th Leg., R.S., ch. 1240, § 1, 1997 Tex. Gen. Laws 4714 (to be codified at Gov't Code § 76.006(f)). Thus, to the extent the requests for information seek officer evaluations who supervise defendants placed on community supervision, you must withhold these documents pursuant to section 552.101 of the Government Code in conjunction with section 76.006(f). The scoresheets of applicants or oral board participants, however, are not made confidential by section 76.006(f).

It appears that the department received a request for the scoresheet information as early as June 2, 1997. The Open Records Act imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten days after the governmental body's receipt of the request for information.³ The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests). The argument you raise against disclosure, the privacy rights of third parties, may provide a compelling reason to overcome the presumption of openness; therefore, we will consider the exception you raise.

You claim the individual scoresheets and qualification appraisal guides are confidential under section 552.101 of the Government Code because their release would violate the applicants' or participants' right of privacy. You argue that

³We note that a request for information to a governmental body need not name the Texas Open Record Act or the Texas Public Information Act. Open Records Decision Nos. 497 (1988), 44 (1974). A hyper-technical reading of the act does not effectuate the purpose of the act; a written communication that reasonably can be judged to be a request for public information is a request for information under the Open Records Act. Open Records Decision No. 44 at 2 (1974); see Open Records Decision No. 497 at 3 (1988).

Moreover, the Open Records Act prohibits consideration of the motives of the requesting party. Attorney General Opinion MW-307 (1981); Open Records Decision Nos. 542 (1990), 508 (1988), 161 (1977), 127 (1976). "The officer of public information and the officer's agent may not make an inquiry of a requestor except to establish proper identification." Gov't Code § 552.222.

[t]he compelling public interest to know how an individual who was not given the position, but was marked down, we feel is protected by the common law right of privacy. There is no compelling governmental interest in determining how an individual was marked down on a promotional board in which he/she was not successful for the position. Marks of a low nature could be embarrassing and of a type that would demean and hurt the individual.

You also contend that the “information is of such a personal and embarrassing nature as to subject the individual whose worksheet is divulged to public shame and humiliation.” Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses both common-law and constitutional privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the “zones of privacy” recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual’s privacy interests against the public’s need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the “most intimate aspects of human affairs.” *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

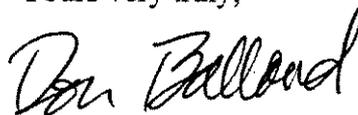
This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and 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), and information concerning the intimate relations between individuals and their family members. *See* Open Records Decision No. 470 (1987).

After examining the submitted material and your arguments, we do not believe that the scoresheets you have submitted may be withheld. Open Records Decision No. 441 at 2 (1986) (job-related examination scores of public employees or applicants for public employment not protected by privacy). Information about the qualifications of a public employee is of legitimate concern to the public. Open Records Decision Nos. 542 (1990), 470 (1987), 467 (1987); *cf.* Open Records Decision Nos. 473 (1987) at 3 (even highly subjective evaluations of public employees may not ordinarily protected by privacy), 470 (1987) at 4 (public employee's job performance does not generally constitute his private affairs), 455 (1987). Consequently, you must release the requested scoresheets.

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 questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 110151

Enclosures: Submitted documents

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