



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 21, 1998

Mr. Scott A. Durfee
General Counsel
Office of the District Attorney
Harris County
201 Fannin, STE 200
Houston, Texas 77002-1901

OR98-2005

Dear Mr Durfee:

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# 116855.

The Harris County District Attorney (the "district attorney") received a request for information regarding a specified case. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Under Chapter 82 of the Government Code which governs the licensing of attorneys, section 82.003(c) provides that "[d]eliberations relating to moral character and fitness of an applicant for a license to practice law may be closed to the public, and records relating to these subjects are exempt from disclosure." We have examined the records contained within Appendix C-3 and agree they are records which relate to the moral character and fitness of an applicant under section 82.003(c) of the Government Code and consequently, these records must be withheld under section 552.101.

¹We 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 No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Additionally, we note that you suggest that disclosure of the requested information would violate various individuals' common-law right to privacy. Information may be withheld under section 552.101 in conjunction with common-law privacy only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. *Industrial Found v Texas Indus Accident Bd*, 540 S.W.2d 668, 685 (Tex 1976), *cert denied*, 430 US 931 (1977). Also, we note that 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 have reviewed the documents submitted for our consideration and have marked the information in Appendix C-1 that must be withheld under constitutional or common-law privacy.

Additionally, you raise Texas Rules of Civil Evidence Rule 408 as applicable to Appendix C-2, which contains correspondence concerning settlement discussions and topics suggested for a particular affidavit.² You contend the underlying correspondence out of

²TRCE 408 Compromise And Offers To Compromise: Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for, or invalidity of, the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice or interest of a witness or a party, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

which the final settlement agreement was drafted touches upon matters sealed by the court order. We believe that the admissibility of information during a trial and the required public release of information under the Open Records Act are two entirely different issues. *cf* Open Records Decision No. 416 at 6 (1984). Section 552.101 does not encompass evidentiary rules. The information in Appendix C-2 may not be withheld under section 552.101 through the application of the Texas Rules of Civil Evidence, Rule 408.

Section 552.107(2) provides that information is excepted from disclosure if “a court by order has prohibited disclosure of the information.” The order in the instant matter is an order of the 234th District Court of Harris County sealing the records in the court’s file in the matter of Cause No. 96-57102 under the provisions outlined in Texas Rules of Civil Procedure, Rule 76a. The order seals the court records including Plaintiff’s Original Petition and Application for Temporary Restraining Order, Plaintiff’s First Request for Production and Request for Admissions to Defendant, various other discovery documents, motions, exceptions, objections, proposed jury charges, psychiatric records and agreed order.

We have reviewed the documents included under Appendix A-2 and agree they fall within those documents enumerated in the seal order and thus must be withheld under section 552.107(2). We also note that some documents attached as exhibits to the depositions in Appendix C-1 fall within the purview of the order and we have marked those documents to be withheld under section 552.107(2) as subject to the court’s order. Additionally, we note that portions of the depositions used as exhibits to Defendant Ligon’s Motion For Summary Judgment must also be withheld as coming within the purview of the court’s seal order.³

Section 552.107(1) provides an exception from disclosure for information that “an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.” This provision excepts information within the attorney-client privilege that contains legal advice, legal opinion, or that reveals client confidences. Open Records Decision Nos. 574 (1990), 462 (1987) at 9-11. We agree that section 552.107(1) excepts documents within Appendix B and Appendix D-2 from disclosure their entirety. We note that some of the information for which you asserted section 552.107(1) protection is also excepted under section 552.111. *See* discussion *infra*. You may withhold the information we have marked as being excepted under section 552.107(1).

³We recognize that ordinarily depositions are not filed with the court and do not become part of the court’s records unless offered into evidence during trial or within other documents such as a bill of exceptions or a motion for summary judgment. As you submitted a representative sample of documents which were specified in the court’s seal order, we note that there may be other deposition excerpts utilized in the other motion for summary judgment filed or in the responses to the motions for summary judgment. We note that those portions of the depositions utilized and filed with the court become subject to the court’s seal order. We advise you to consider whether the documents specified in the court’s seal order have been included as exhibits or appendices.

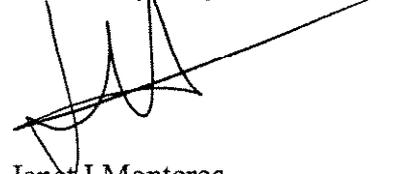
Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This office issued Open Records Decision No. 647 (1996), holding that a governmental body may withhold information under section 552.111 of the Government Code as attorney work product if the governmental body can show (1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank v Brotherton*, 851 S.W.2d 193 (Tex 1993), or after a civil lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories" Open Records Decision No. 647 (1996) at 5. We have reviewed the information in Appendix D-1. It appears to be information that was prepared for civil trial and therefore it must be withheld from disclosure under section 552.111.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Janet I Monteros
Assistant Attorney General
Open Records Division

JIM/nc

Ref: ID# 116855

Enclosures: Submitted documents

cc: Mr E.L. Wheeler
P. O. Box 3584
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(w/o enclosures)