



July 8, 1999

Mr. Raymond D. Martinez
Assistant City Attorney
Criminal Law and Police Division
City of Dallas
2014 Main Street, Room 206
Dallas, Texas 75201

OR99-1904

Dear Mr. Martinez:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 125552.

The Dallas Police Department (the "department") received an open records request for all records pertaining to the absence from duty of a former civilian department employee. You contend the requested information is excepted from required public disclosure pursuant to section 552.108(a)(1) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from required public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." You inform us that the referenced employee was a witness to a criminal assault allegedly committed by the requestor and that the prosecution of that assault is pending. You contend that the department may withhold the requested information pursuant to section 552.108 because

[t]he data produced by or for the various divisions of the Department in connection with criminal activity qualify as the type of information held by a law enforcement agency and prosecutor that deals with the investigation of a crime. The release of this data seriously undermines and interferes with current criminal investigations because aspects of those investigations would become public information and suspects would be informed of the type of evidence possessed by law enforcement personnel.

We have reviewed the information at issue. Only a very small portion of the requested records make reference to the alleged assault. Most of the information solely pertains to the employee's absence from work. You have not explained, nor is it apparent from the

documents before us, how the release of the information would interfere with the criminal investigation or prosecution of the alleged assault. We, therefore, conclude that the department may not withhold any of the requested information pursuant to section 552.108.

Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 at 1 (1982), we will raise section 552.101 of the Government Code, which protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. *See* Government Code § 552.352.

Some of the documents you submitted to this office for review are made confidential by statute. The “Handicapped Employee Survey Sheet” is made confidential under the Americans with Disabilities Act of 1990 (the “ADA”), 42 U.S.C. § 12101 *et seq.* As noted in Open Records Decision No. 641 (1996),

Title I of the ADA and the EEOC regulations adopted pursuant to specific statutory authority provide for the confidentiality of medical condition and history information collected from applicants and employees. . . . Section 12112(d)(4)(C) provides that information “regarding the medical condition or history of any employee” obtained as part of a work-site based health program also must be maintained on separate forms, in separate files, and be kept confidential. *See also* 29 C.F.R. § 1630.14(d)(1) (providing that this information “*shall* be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record”) (emphasis added). As to information obtained from employees’ job-related medical examinations or medical inquiries, the interpretive rules make clear that medical condition and medical history information so obtained is subject to the same restrictions:

(c) *Examination of employees.* A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record
Id. § 1630.14.

The ADA allows certain types of medical information to be disclosed in order to ensure safety, proper accommodation of employees' disabilities, and compliance with ADA provisions. Section 12112(d)(3)(B) of title 42 of the United States Code provides that information regarding medical condition or medical history may be disclosed as follows:

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request.

Although section 12112(d)(3)(B) specifically addresses information obtained from applicants at the conditional job offer phase, these restrictions also are applicable to information about medical conditions and medical histories obtained from employees. 29 C.F.R. § 1630.14(c)(1)(i)-(iii).

We have attached yellow flags to the documents that the department must withhold in accordance with the ADA.

Section 552.101 also protects information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

In *Industrial Foundation*, the Texas Supreme Court held as intimate and embarrassing information that relates 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. *Industrial Found.* at 683. This office has also determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information

regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982). Upon review, we conclude that some of the information submitted to this office is highly intimate or embarrassing. The department must withhold the information we have marked in brackets pursuant to common-law privacy.

We also note that some of the records at issue contain the home address, home telephone number, and social security number of the named employee. Section 552.117(1) of the Government Code exempts from disclosure, among other things, the home address and social security numbers of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). If the employee made the election prior to the date on which the department received the open records request, the department must withhold these categories of information pursuant to section 552.117(1). Otherwise, these types of information must be released.

Finally, we have also marked a few small portions of the records at issue that must be withheld pursuant to section 552.130 of the Government Code. The department must release all of the remaining requested information, except as discussed above.

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.

Sincerely,



Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/RWP/eaf

Ref.: ID# 125552

Encl. Marked documents

cc: Mr. Harold B. Cornish
601 Nora Lane
DeSoto, Texas 75115
(w/o enclosures)