



March 26, 2001

Mr. Steve Aragon
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2001-1173

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 144888.

The Texas Health and Human Services Commission (the “commission”) received a request for the complete investigative file concerning a complaint made by the requestor about officials of the Texas Department of Health (“TDH”). You claim that portions of the requested information are excepted from public disclosure under sections 552.101, 552.103, 552.107(1), 552.111, 552.117, and 552.130 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.¹

¹You inform this office that the submitted records include information that TDH transferred to the commission, which provides oversight to TDH, for the purposes of the commission’s investigation. We note that information may be transferred between governmental bodies that are subject to the Public Information Act without waiving exceptions to the public disclosure of that information or affecting its confidentiality. *See* Attorney General Opinion JM-590 (1986); Open Records Decision Nos. 655 (1997), 567 (1990), 561 (1990), 516 (1989). These decisions are based on the well-settled policy of this state that governmental agencies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. *See* Open Records Decision No. 516 (1989). Thus, the release of information by one state agency to another state agency is not a release to the public for the purposes of section 552.007 of the Government Code, which prohibits the selective disclosure of information, or for those of section 552.352, which provides criminal penalties for the release of information that is considered to be confidential. *Id.*

We first note that the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

- (18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(1), (3), (18) (emphasis added). You inform this office that the commission gathered the submitted records during the course of an investigation of a complaint involving TDH. As you indicate that the commission has completed its investigation, all of the records relating to the investigation are subject to required release under section 552.022(a)(1). Furthermore, the submitted records include documents that fall within the scope of subsections (3) and (18) of section 552.022(a). The submitted records are therefore subject to required public disclosure under section 552.022(a), except to the extent that any of the information contained in the records is expressly confidential under other law. Sections 552.103, 552.107(1), and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived; as such, those exceptions do not constitute other law that makes information expressly confidential for the purposes of section 552.022(a). Thus, we will not address your claims under sections 552.103, 552.107(1), and 552.111. *See* Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 does not implicate third-party rights and is waivable by governmental body), 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107(1)), 470 at 7 (1987) (governmental body has discretion to release information protected by statutory predecessor to section 552.111).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that is made confidential by another statute. You claim

that the submitted records contain information that is confidential under section 552.101 in conjunction with Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked information that is confidential and must be withheld under section 552.101 in conjunction with the ADA.

You claim that other responsive information is confidential under section 552.101 in conjunction with section 246.26(d) of title 7 of the Code of Federal Regulations, which pertains to the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"). You explain that section 246.26(d) restricts the use or disclosure of information obtained from program applicants and participants to certain persons directly connected with the administration or enforcement of the program and to certain entities for the purpose of determining the eligibility of and conducting outreach to WIC applicants and participants. You state that the requestor does not fall within the purview of those allowed access to the information. Based on your representations, we have marked information that the commission must withhold under section 552.101 in conjunction with section 246.26(d) of title 7 of the Code of Federal Regulations.

The commission also seeks to withhold "information that was discussed during an executive session of the Board of Health at the Texas Department of Health" under section 552.101 in conjunction with section 551.146 of the Texas Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code § 551.001 *et seq.* You state that the source of the information in question was an individual who was present in the executive session and that the information recites part of the discussion that occurred during the closed meeting. The proceedings of a governmental body during an executive session are not absolutely confidential. *See* Attorney General Opinion JM-1071 (1989) (stating that statutory predecessor to section 551.146 of the Government Code does not prohibit members of a governmental body or other individuals in attendance at an executive session from making public statements about the subject matter of that session); Open Records Decision Nos. 605 (1992), 485 at 9 - 10 (1987) (records held by a governmental body are not made confidential merely because they were discussed during an executive session). Thus, the Open Meetings

Act does not prohibit the commission from disclosing statements that were made during the executive session of the Board of Health.

You also raise section 552.101 of the Government Code in conjunction with the common law right to privacy. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from disclosure under section 552.101 in conjunction with common law privacy 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. See *Industrial Found.*, 540 S.W.2d at 685. The matters considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimacy, psychiatric treatment, attempted suicide, and injuries to reproductive organs. *Id.* at 683; see also Open Records Decision No. 659 at 5 (1999).

Common law privacy also protects some personal financial information from public disclosure. Prior decisions of this office have determined that financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See generally Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983). On the other hand, common law privacy does not except from disclosure information about a transaction that is funded in part by the state or another governmental entity. See, e.g., Open Records Decision Nos. 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to a public body about an individual and basic facts regarding a particular financial transaction between the individual and the public body).

We have marked a small amount of information, including personal financial information, that the commission must withhold under section 552.101 in conjunction with common law privacy. But you may not withhold the information that relates solely to credit cards issued to governmental bodies. See also Open Records Decision No. 385 at 2 (1983) (noting policy of full disclosure of public body's debtors and creditors).

You also seek to withhold, under section 552.101, records relating to allegations of sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied), the court applied the common law right to privacy addressed in *Industrial Foundation* to an investigation of allegations of sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. See 840 S.W.2d at 525. The court upheld the release of the

affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

This office typically has required the release of a document that is analogous to the conclusions of the board of inquiry in *Ellen*, but has held that a governmental body must withhold both the identities of victims and witnesses of alleged sexual harassment and any information that would tend to identify such a victim or witness. *See* Open Records Decision Nos. 393 (1983), 339 (1982). In this instance, the submitted records do not include a document that we consider to be analogous to the conclusions of the board of inquiry in *Ellen*. Therefore, in releasing the responsive records that relate to the alleged sexual harassment, the commission must withhold the identities of the victim and witnesses and information that would tend to identify the victim and the witnesses. We have marked that information. But you may not withhold the identities of individuals accused of sexual harassment, as common law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about the employee's job performance. *See* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978).

The commission also seeks to withhold information that you claim is protected by the attorney-client privilege. Although section 552.107(1), which you raise, does not protect information that is subject to disclosure under section 552.022, the attorney-client privilege also is found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022" of the Government Code. *See In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information in question is confidential under Rule 503.

Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a

representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX.R.EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication that was transmitted between privileged parties or that reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, a document containing privileged information is confidential under Rule 503, provided that the client has not waived the privilege and that the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The commission seeks to withhold documents that you claim are "confidential as legal advice and/or client confidences of TDH." Upon careful review, we have marked the documents that are confidential and thus excepted from disclosure under Rule 503. In other instances, the commission either has not identified the parties to a communication, and thus has not shown that the communication was transmitted between privileged parties, or has failed to demonstrate that the communication was made in furtherance of the rendition of professional legal services to the client. In those instances, the document at issue is not confidential under Rule 503 and must be released.

You also raise section 552.117(1) of the Government Code, which excepts from public disclosure the home address, home telephone number, and social security number of a current or former employee of a governmental body, as well as information revealing whether the employee has family members, *if the current or former employee requested that this information be kept confidential under section 552.024*. *See* Open Records Decision Nos. 622 (1994), 455 (1987). This information may not be withheld, however, in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of

information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). In this instance, you represent to this office that the commission ascertained, by consulting with TDH, whether and to what extent the individuals to whom the submitted records pertain requested the withholding of their respective home address and telephone number, social security number, and family member information under section 552.024. You inform us that your markings under section 552.117(1) correspond to the information that TDH provided. Based on these representations, we have marked the information that the commission must withhold under section 552.117(1).²

A social security number also may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number in the submitted records is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have identified social security numbers that you claim were obtained or are maintained under section 441.182 of the Government Code. But it does not appear to this office that section 441.182 authorizes TDH to obtain or maintain a social security number. You have cited no other law, and we are aware of no law, enacted on or after October 1, 1990, that authorizes TDH to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security numbers in question were obtained or are maintained pursuant to such a statute and are therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, you should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Lastly, section 552.130 of the Government Code excepts from disclosure "a motor vehicle operator's or driver's license or permit issued by an agency of this state" and "a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(1), (2). You must withhold Texas driver's license and license plate numbers under section 552.130.

In summary, the requested records include information that is confidential under section 552.101 of the Government Code, in conjunction with federal law and common law

²In those instances in which you did not mark an individual's social security number or family member information for withholding under section 552.117(1), we presume that the individual's election under section 552.024 preceded the Seventy-fourth Legislature's amendment of sections 552.024 and 552.117. *See* Act of May 29, 1995, ch. 1035, §§ 5, 9, 1995 Tex. Gen. Laws 5127, 5130, 5132 (amending Gov't Code §§ 552.024 and 552.117 to permit withholding of employee social security number and family member information).

privacy, and under Texas Rule of Evidence 503. The records also include social security numbers and other personal information relating to current or former governmental employees that the commission must withhold under sections 552.024 and 552.117. A social security number also may be confidential under section 552.101 in conjunction with federal law. Information relating to motor vehicle records must be withheld under section 552.130. With these exceptions, the requested information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

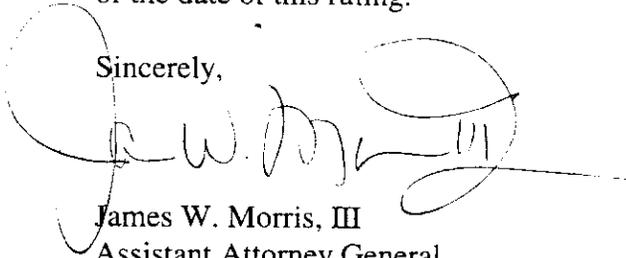
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III'. The signature is fluid and cursive, with a large initial 'J' and a long horizontal stroke at the end.

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

JWM/seg

Ref: ID# 144888

Encl: Marked documents

cc: Mr. Charles Pankey
1510 West North Loop, Building 10
Austin, Texas 78756
(w/o enclosures)