



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2006

Mr. James Downes
Assistant County Attorney
Harris County
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2006-05803

Dear Mr. Downes:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 250666.

The Harris County Hospital District (the "district") received a request for the following information: (1) the personnel file of a named former employee of the district; (2) all information, including any documents, notes, identities of interviewees, and witness statements, related to the sexual harassment claim filed against the former employee by the requestor; and (3) the findings that led to the termination of the former employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See Gov't Code § 552.301(b)*. While you raised sections 552.101, 552.102, 552.117, 552.130, and 552.147 of the Government Code within the ten-business-day deadline as required by subsection 552.301(b), you did not raise section 552.103 of the Government Code until after the ten-business-day deadline had

passed. Accordingly, we find that you have waived your claim under section 552.103. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 522 at 4 (1989) (discretionary exceptions in general). Therefore, no portion of the submitted information may be withheld under section 552.103.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of common law privacy. Section 552.102 of the Government Code excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” *Id.* § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-685 (Tex. 1976). Accordingly, we will consider your section 552.102 claim in the context of the doctrine of common law privacy under section 552.101 of the Government Code.

For information to be protected by common law privacy it must meet the criteria set out in *Industrial Foundation*. The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating 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. *Id.* at 683. Prior decisions of this office have determined that some kinds of medical information and personal financial information not related to a transaction between an individual and a governmental body are protected by common law privacy. *See* Open Records Decision Nos. 600 (1992) (personal financial information not related to transaction with governmental body generally not subject to legitimate public interest), 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, procedures, and physical disabilities protected by privacy). However, this office has also determined that the essential facts about a financial transaction between an individual and a governmental body generally are subject to a

legitimate public interest. See Open Decision Nos. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common law privacy), 523 (1989).

In addition, 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 alleged 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.*

When there is an adequate summary of an investigation, the summary and any statements of the person under investigation must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note that, because supervisors are not witnesses for purposes of *Ellen*, supervisors' identities may not generally be withheld under section 552.101 in conjunction with common law privacy and the holding in *Ellen*.

In this instance, some of the submitted information relates to an investigation into allegations of sexual harassment. Because we find that there is no adequate summary of the investigation, the documents relating to the sexual harassment investigation must generally be released, with the identities of the alleged victims and witnesses redacted. We note, however, that the requestor is an alleged victim in the investigation. Section 552.023 of the Government Code gives a person or a person's authorized representative a "special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023. Therefore, the requestor has a special right of access to information in the submitted documents that would otherwise be protected from public disclosure based on her privacy interests. However, the district must withhold the identities of the other alleged victims and the witnesses, which we have marked, pursuant to sections 552.101 and 552.102 in conjunction with common law privacy and the holding in *Ellen*.

Based on our review of the remaining information at issue, we find that the medical and personal financial information we have marked is confidential under common law privacy

and must be withheld under sections 552.101 and 552.102 on that basis. We find, however, that no portion of the remaining information is confidential under common law privacy, and therefore no portion of it may be withheld under either section 552.101 or 552.102 on that basis. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

You also argue that section 241.152 of the Health and Safety Code is applicable to the portions of the remaining information. Section 552.101 of the Government Code also encompasses information made confidential by another statute. Section 241.152 of the Health and Safety Code provides in relevant part:

(a) Except as authorized by Section 241.153, a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient or the patient's legally authorized representative without the written authorization of the patient or the patient's legally authorized representative.

(b) A disclosure authorization to a hospital is valid only if it:

(1) is in writing;

(2) is dated and signed by the patient or the patient's legally authorized representative;

(3) identifies the information to be disclosed; and

(4) identifies the person or entity to whom the information is to be disclosed.

Health & Safety Code § 241.152(a), (b). Section 241.151(2) of the Health and Safety Code defines "health care information" as "information recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." Health & Safety Code § 241.151(2). You claim that the remaining information includes health care information pertaining to patients. You do not inform us that the district has received written authorization to release any health care information. Accordingly, we have marked the identifying information of patients that the district must withhold pursuant to section 552.101 in conjunction with section 241.152(a) of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses statutes that make criminal history record information ("CHRI") confidential. CHRI "means information collected about

a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Under chapter 411 of the Government Code, the district may obtain CHRI from the Department of Public Safety (“DPS”) or from another criminal justice agency for certain purposes. *Id.* §§ 411.136(e), .087(a)(2). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. *Id.* § 411.136(e); *see also id.* § 411.087 (b) (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). After review of your arguments and the remaining information, we find that none of the information at issue constitutes CHRI obtained from DPS or any other criminal justice agency. *See id.* § 411.082(2). Therefore, we conclude that no portion of the remaining information is excepted from disclosure under section 552.101 in conjunction with federal law and chapter 411 of the Government Code.

We note that some of the submitted information is subject to the Family Medical Leave Act (the “FMLA”), section 2654 of title 29 of the United States Code, which is also encompassed by section 552.101 of the Government Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Some of the submitted documents are confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find that none of the release provisions of the FMLA apply to these documents. Thus, we conclude that the district must withhold the documents we have marked pursuant to section 552.101 in conjunction with the FMLA.

The submitted information also includes a W-4 form. Section 552.101 of the Government Code encompasses section 6103(a) of Title 26 of the United States Code, which provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the district must withhold the submitted W-4 form pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

You claim that portions of the remaining information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1); *see also* Open Records Decision No. 670 (2001) (extending section 552.117(a)(1) exception to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). In this instance, the submitted documentation indicates that the former employee at issue elected, prior to the district's receipt of this request, to keep his home address, home telephone number, and social security number confidential. However, this documentation does not indicate that the former employee timely elected to keep his family member information confidential. Therefore, to the extent that the former employee elected prior to the district's receipt of this request to keep his family member information confidential, such information, in addition to the former employee's home address, home telephone number, personal pager number, and social security number, must be withheld under section 552.117(a)(1).¹ However, if the former employee did not timely elect to keep his family member information confidential, such information may not be withheld pursuant to section 552.117(a)(1).

The remaining documents include Texas motor vehicle record information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). Accordingly,

¹As we are able to make this determination, we need not address your claim under section 552.147 of the Government Code.

the district must withhold the Texas motor vehicle information we have marked under section 552.130.

In summary, we conclude as follows: (1) the marked identifying information of alleged sexual harassment victims and witnesses must be withheld under sections 552.101 and 552.102 of the Government Code in conjunction with common law privacy and the holding in *Ellen*; (2) the marked medical and personal financial information must be withheld under sections 552.101 and 552.102 of the Government Code in conjunction with common law privacy; (3) the marked identifying information of patients must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 241.152(a) of the Health and Safety Code; (4) the documents we have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with the FMLA; (5) the submitted W-4 form must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (6) to the extent that the former employee at issue elected prior to the district's receipt of this request to keep his family member information confidential, such information, in addition to his home address, home telephone number, personal pager number, and social security number, must be withheld under section 552.117(a)(1) of the Government Code; and (7) the marked Texas motor vehicle record information must be withheld under section 552.130 of the Government Code. The remaining submitted information must be released to the requestor.²

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, upon receiving this ruling, the governmental body

²Because some of the information marked for release is confidential with respect to the general public, if the district receives a future request for this information from an individual other than the requestor or the requestor's authorized representative, the district should again seek our decision.

will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 250666

Enc. Submitted documents