



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 12, 2009

Mr. John C. West
General Counsel
Office of the Inspector General
Texas Department of Criminal Justice
P.O. Box 13084
Austin, Texas 78711

OR2009-06355

Dear Mr. West:

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# 343199 (OIG ORR Files # 2009-00060).

The Texas Department of Criminal Justice (the "department") received a request from a former department employee for documentation pertaining to any investigation she may have been involved in while employed at the department that may have had some factor in being denied rehire with the department, including any notes written by anyone involved in any such investigation. You state the department will release some information to the requestor with redactions pursuant to the previous determination issued by this office in Open Records Letter No. 2005-01067-(2005).¹ You also state you are withholding social security numbers under section 552.147 of the Government Code.² You claim the submitted information is

¹Open Records Letter No. 2005-01067 serves as a previous determination that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, are excepted from disclosure under section 552.117(a)(3) of the Government Code.

²We note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

excepted from disclosure under sections 552.101 and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state a portion of the submitted information is subject to Open Records Letter No. 2004-6370 (2004), which serves as a previous determination under section 552.301(a) of the Government Code for the department with respect to shift rosters. Therefore, pursuant to that previous determination, the department may withhold the submitted shift rosters under section 552.108(b)(1) of the Government Code. *See* Open Records Decision No. 673 at 7-8 (2001) (establishing criteria for previous determinations).

You claim the remaining information is excepted from disclosure under section 552.134 of the Government Code. Section 552.134(a) relates to inmates of the department and provides:

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Based on your representations and our review, we agree portions of this information, which we have marked, are subject to section 552.134. Further, the exceptions in section 552.029 of the Government Code are not applicable to the information we have marked. Therefore, the department must withhold the information we have marked pursuant to section 552.134 of the Government Code. We find, however, the department has failed to demonstrate how the remaining information is subject to section 552.134; therefore, no portion of the remaining information may be withheld under section 552.134.³

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. Section 552.101 encompasses chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

³We note basic information regarding an incident involving the use of force is not subject to section 552.134 of the Government Code. Gov't Code § 552.029(8).

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(2). Section 611.001 defines a “patient” as a person who consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder. *Id.* § 611.001(1). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. Health & Safety Code §§ 611.004, .0045. Upon review, we agree the document we marked is a mental health record that is confidential under section 611.002, and it must be withheld under section 552.101 of the Government Code.

We note some of the remaining information is subject to common-law privacy.⁴ Section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 688, 685 (Tex.1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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. In addition, this office has found medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked portions of the submitted information that are considered highly intimate or embarrassing and not of legitimate public concern. This information must be withheld pursuant to section 552.101 in conjunction with common-law privacy.

In summary, the department may withhold the submitted shift rosters under section 552.108(b)(1) of the Government Code pursuant to the previous determination in Open Records Letter No. 2004-6370. The department must withhold the information we have marked under section 552.134 of the Government Code, the mental health record we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code, and the information we have marked under section 552.101

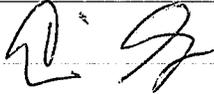
⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

of the Government Code in conjunction with common-law privacy. The remaining information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/rl

Ref: ID# 343199

Enc. Submitted documents

c: Requestor
(w/o enclosures)