



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2010

Mr. Scott A. Durfee
Assistant General Counsel
Harris County District Attorney
1201 Franklin, Suite 600
Houston, Texas 77002-1901

OR2010-07356

Dear Mr. Durfee:

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# 380471.

The Harris County District Attorney's Office (the "district attorney") received a request for the personnel file of a named former Assistant District Attorney, excluding payroll records. You assert no exceptions to disclosure of this information but indicate that a third party's rights may be implicated by the present request. We have received comments from an interested third party, the attorney for the named former Assistant District Attorney, regarding the information at issue. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, the interested third party is concerned with the unknown affiliation of the requestor with the requesting company. We note, however, the identity of the requestor is generally not a factor to be considered when a governmental body receives a request for information. *See id.* § 552.223 (requiring uniform treatment of all requests for information). Further, the requestor states he is making the request for information pursuant to the Act. This office has determined the Act does not permit the consideration by a governmental body or this office of a requestor's intended use of information when responding to open records requests. *See id.* § 552.222(a) (stating governmental body may not inquire into purpose for which information will be used); *see also* Open Records Decision Nos. 508 at 2 (1988) (motives

of a person seeking information under the Act are irrelevant), 51 (1974). Therefore, the district attorney may only withhold the submitted information if it is excepted from disclosure under the Act or made confidential by law.

Section 552.028(a) provides a governmental body is not required to accept or comply with a request for information from either of the following:

- (1) an individual who is imprisoned or confined in a correctional facility; or
- (2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under this chapter.

Gov't Code § 552.028(a). The interested third party argues that it cannot be determined whether the requestor is "an agent of a person who is imprisoned or confined in a correctional facility as a result of [the former Assistant District Attorney's] work" with the district attorney. However, the fact that the former Assistant District Attorney worked for the district attorney does not establish that the requestor submitted the request as an agent of a person imprisoned due to the former Assistant District Attorney's work. As the interested third party has not provided any additional information establishing that the requestor is in fact acting as an agent of an inmate, we cannot conclude that section 552.028 is applicable in this instance. Accordingly, we will address the interested third party's arguments against disclosure under the Act.

Section 552.102(a) of the Government Code excepts from 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(a) is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976).

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication 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. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate

aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (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). Upon review, we find the submitted information either is not intimate or embarrassing or is of legitimate public interest. Therefore, no portion of the submitted information may be withheld under section 552.102(a).

Section 552.102(b) excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Gov't Code § 552.102(b). We note, however, the submitted information does not contain a transcript from an institution of higher education that is maintained in the personnel file of a professional public school employee. Accordingly, no portion of the submitted information may be withheld under section 552.102(b).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code.¹ *See id.* §§ 552.117(a)(1), .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. The district attorney does not inform us that the individuals whose information is at issue elected to withhold their personal information under section 552.024 prior to the date of this request. Therefore, to the extent the employees timely elected to keep their personal information confidential, the district attorney must withhold the information we have marked under section 552.117(a)(1) of the Government Code. To the extent the employees did not make a timely election, the information may not be withheld. As no further exceptions to disclosure are raised, 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.

¹ Although the interested third party raises section 552.024 as an exception to disclosure, we understand the interested third party to claim section 552.117 of the Government Code, as this is the proper exception for the substance of the argument.

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, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 380471

Enc. Submitted documents

c: Requestor
(w/o enclosures)