



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2010

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County
300 Dolorosa, Fourth Floor
San Antonio, Texas 78205

OR2010-11022

Dear Ms. Dye:

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# 387735.

The Bexar County Criminal District Attorney's Office (the "district attorney") received a request for information related to a specified complaint and related investigation involving the requestor. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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 the doctrine of common-law privacy. Common-law privacy protects information if it (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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

The types of information considered intimate or 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 certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy.

See Open Records Decision Nos. 470 (1987), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure).

You generally cite to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), in support of your argument under common-law privacy for the submitted information. In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. Here, however, the submitted information does not relate to an allegation of sexual harassment. Because the allegations do not concern sexual harassment, we find that *Ellen* is not applicable in this instance. Consequently, the district attorney may not withhold any of the submitted information under section 552.101 in conjunction with common-law privacy on the basis of *Ellen*.

This office has found that information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Although the information at issue involves allegations of misconduct by district employees, we find that there is a legitimate public interest in the work conduct and job performance of the employees at issue in the submitted information.

Upon review, we find portions of the submitted information to be highly intimate or embarrassing and not of legitimate public interest. Accordingly, the district attorney must withhold this information, which we have marked, under section 552.101 in conjunction with common-law privacy. However, as the remaining information deals with the work conduct of a public employee, we find this information is of legitimate concern to the public. Accordingly, the district attorney may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

We note that some of the remaining submitted information is subject to section 552.117 of the Government Code.¹ Section 552.117(a)(1) of the Government Code exempts 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 this information be kept confidential under section 552.024 of the Government Code. *See id.* §§ 552.117(a)(1), .024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district attorney may only withhold information under

¹The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.117(a)(1) on behalf of a former or current employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. We have marked information that is subject to section 552.117. The submitted records indicate that the individual at issue has timely elected confidentiality for the individual's personal information. Therefore, the district attorney must withhold the personal information pertaining to that individual, which we have marked, under section 552.117(a)(1). We note the requestor has a right of access to his own personal information and the district attorney may not withhold it from him under section 552.117(a)(1). *See* Gov't Code § 552.023 (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests).

In summary, the district attorney must withhold the information we have marked under (1) section 552.101 in conjunction with common-law privacy, and (2) section 552.117(a)(1) of the Government Code. The remaining submitted information must be released to the requestor.²

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

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

²We note that the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023(a). However, if the district attorney receives another request for this particular information from a different requestor, then the district attorney should again seek a decision from this office.

Ref: ID# 387735

Enc. Submitted documents

c: Requestor
(w/o enclosures)