



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 18, 2010

Mr. Thomas D. McClure  
Assistant General Counsel  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2010-17498

Dear Mr. McClure:

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# 400647 (DSHS File # 017910-2010).

The Texas Department of State Health Services (the "department") received a request for information in the requestor's personnel file, including e-mails, performance reviews, time cards, and information pertaining to reasonable accommodation requests.<sup>1</sup> You state you have released or will release some of the requested information. We understand you will redact personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You claim portions of the remaining information are excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>The department sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

<sup>2</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make confidential. Section 552.101 has been found by this office to encompass information made confidential by federal regulations. *See Rainbow Group, Ltd. v. Tex. Employment Comm'n*, 897 S.W.2d 946 (Tex. App.—Austin 1995, writ denied) (court approves office of attorney general finding to withhold, under section 552.101, unemployment compensation identification numbers as made confidential by federal regulations). You claim that the information you have marked is confidential pursuant to section 246.26(d) of title 7 of the Code of Federal Regulations. Section 246.26(d) of this title provides in relevant part:

Except as otherwise permitted by this section, the State agency must restrict the use and disclosure of confidential applicant and participant information to persons directly connected with the administration or enforcement of the [Women, Infants, and Children] WIC Program whom the State agency determine have a need to know the information for WIC Program purposes. These persons may include, but are not limited to: personnel from its local agencies and other WIC State or local agencies; persons under contract with the State agency to perform research regarding the WIC Program, and persons investigating or prosecuting WIC Program violations under Federal, State, or local law.

7 C.F.R. § 246.26(d)(1)(ii). You state that the information you have marked consists of WIC client or applicant numbers in addition to client names and other client identifiers. You assert this information should be withheld as it could identify a WIC client, applicant, participant, and/or family member. *See 7 C.R.F § 246.26(d)(1)(i)* (confidential applicant and participant information is any information that individually identifies an applicant, participant, or family member). You state disclosure of such information is prohibited by section 246.26(d). Upon review, we agree the information you have marked, and the additional information we have marked, must be withheld under section 552.101 of the Government Code in conjunction with section 246.26(d) of title 7 of the Code of Federal Regulations.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* include 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. This office has also found some 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) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the department must withhold this information under section 552.101 in conjunction with common-law privacy. We note section 552.023 gives a person 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 disclosure by laws intended to protect that person's privacy interests. *See* Gov't Code § 552.023. In this instance, a portion of the remaining information you seek to withhold under common-law privacy pertains to the requestor. The requestor has a special right of access to information pertaining to himself under section 552.023 of the Government Code. Further, we find the remaining information you have marked is either not highly intimate or embarrassing or is of legitimate public concern. Accordingly, the department may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code exempts 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 this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117, .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 only be withheld under section 552.117(a)(1) 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. You inform us two of the employees at issue, one of whom is the requestor, timely elected confidentiality under section 552.024. Accordingly, the department must withhold the personal information pertaining to the employee who is not the requestor, which we have marked, under section 552.117(a)(1) of the Government Code. However, the remaining information you have marked pertains either to the requestor or to an employee who you inform us did not elect confidentiality or does not consist of personal information for the purposes of section 552.117 of the Government Code. As noted above, the requestor has a right of access to his own personal information under section 552.023 of the Government Code and the department may not withhold it from him under section 552.117(a)(1). *See* Gov't Code § 552.023. We also note the department may not withhold personal information of an employee who did not elect confidentiality under section 552.024 of the Government Code. Accordingly, the department may not withhold any of the remaining information under section 552.117(a)(1) of the Government Code.

In summary, the department must withhold the information you have marked and the information we have marked under section 552.101 of the Government Code in conjunction with section 246.26(d) of title 7 of the Code of Federal Regulations. The department must

withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information must be released.<sup>3</sup>

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](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,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/em

Ref: ID# 400647

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>The requestor has a special right of access to some of the information being released. *See* Gov't Code § 552.023(a). Therefore, if the department receives another request for this particular information from a different requestor, it should again seek a ruling from this office.