



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2012

Mr. John Sirman
Legal Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas

OR2012-15097

Dear Mr. Sirman:

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# 466117.

The State Bar of Texas (the "State Bar") received a request for information related to a former employee. You state some of the requested information has been released. Although you take no position on the public availability of the submitted information, you believe it may implicate the former employee's privacy interests. You inform us the former employee was notified of this request for information and of his right to submit comments to this office as to why the submitted information should or should not be released.¹ We received correspondence from the former employee. We have considered his comments and reviewed the information you submitted.

We first note the request for information consists of questions. A governmental body is not required to answer factual questions, conduct legal research, or create new information in responding to a request for information under the Act. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, a governmental body is not required to take affirmative steps to create or obtain information it does not possess, so long as no other individual or entity holds the information on behalf of the governmental body that

¹See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

received the request. See Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). A governmental body must make a good-faith effort, however, to relate a request to responsive information that is within the governmental body's possession or control. See Open Records Decision No. 561 at 8-9 (1990). You indicate the State Bar has done so.

Among other things, the former employee contends the submitted information "is not an entirely factual account of why [he] resigned" and has pages missing. As previously noted, the State Bar indicates a good-faith effort was made to locate the information responsive to the present request. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.² As for the accuracy of the information the State Bar has submitted, this office explained in the course of concluding section 552.101 of the Government Code does not encompass the doctrine of false-light privacy:

If false-light privacy law were deemed to control the disclosure of information under the [A]ct, much information of legitimate public concern might well be withheld for fear that it could be false. Yet we feel that the purpose of the [A]ct is best served by the disclosure of even doubtful information, even if embarrassing, if it relates to the conduct of the public's affairs. If, as in the case before us, the information is uncertain or contradictory, the [Act] allows the public to review the evidence and come to its own conclusions, rather than allowing the governmental body to determine the weight of the evidence itself, evidence that may reflect poorly on that very body.

Open Records Decision No. 579 at 7 (1990); see also *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994) (holding false-light privacy is not an actionable tort under Texas law). As we noted in Open Records Decision No. 579, "this office lacks both the mandate and the tools to determine the falsity of information in the records of governmental bodies." ORD 579 at 6. Therefore, we will address the public availability of the information the State Bar has submitted.

The former employee also asserts the State Bar assured him "all that would be disclosed to anyone inquiring about [his] separation [from employment] is that [he] had resigned." He states that, "whether voluntary or not, the understanding was that the reasons for my resignation[] could and would not be disclosed to anyone." We note a governmental body may not withhold information governed by the Act on the basis of a promise to keep the information confidential, unless the governmental body has specific statutory authority to

²See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

make such a promise. See Open Records Decision Nos. 514 at 1 (1988), 479 at 1-2 (1987), 444 at 6 (1986). The former employee does not inform us, nor does the State Bar indicate, it has any such authority. Therefore, the submitted information may not be withheld from disclosure on the basis of any promise or agreement to do so.

Next, we address the former employee's exceptions to disclosure under sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The former employee appears to claim section 552.101 in conjunction with federal laws applicable to the Equal Employment Opportunity Commission (the "EEOC"). This office has determined section 552.101 can encompass a federal statute or regulation enacted pursuant to statutory authority. See Open Records Decision No. 476 (1987) (addressing statutory predecessor to Gov't Code § 552.101). We also have concluded, however, that the confidentiality provisions of the federal laws applicable to the EEOC apply only when the information at issue is held by the EEOC. See Open Records Decision Nos. 245 at 2 (1980) (City of Rio Hondo may not withhold information under section 2000e-5 or 2000e-7 of title 42 of the United States Code), 155 at 2 (1977) (City of Austin may not withhold information under section 2000e-5), 59 at 2 (1974) (Dallas County may not withhold information under section 2000e-8). Likewise, a federal court has held that Title VII of the Civil Rights Act of 1964, section 20004 of title 42 of the United States Code, proscribes the release of information when it is held by the EEOC or EEOC employees but does not prevent an employer from releasing information. See *Whitaker v. Carney*, 778 F.2d 216, 221-22 (1985). In this instance, the information at issue is held by the State Bar and not by the EEOC or its employees. We therefore conclude the State Bar may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with federal law.

Section 552.101 of the Government Code also encompasses constitutional and common-law privacy. Constitutional privacy under section 552.101 protects two types of interests. See Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions relating to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. See *id.* at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

Common-law privacy under section 552.101 protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary

sensibilities, and of no legitimate public interest. 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 elements of the test must be established. *Id.* at 681-82. Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of information also are private under section 552.101. See generally *Open Records Decision No. 659* at 4-5 (1999) (summarizing information attorney general has held to be private).

We note the submitted information is related to the former employee's conduct as an employee of the State Bar. The public generally has a legitimate interest in information involving public employees and public employment. See *Open Records Decision Nos. 562* at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact of public employee's receipt of less than perfect or even very bad evaluation not private), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 5 (1986) (public has legitimate interest in knowing reasons for public employee's dismissal, demotion, or promotion), 405 at 2 (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private). In this instance, the former employee has not demonstrated his privacy interests outweigh the public's interest in the submitted information. Likewise, he has not demonstrated the information at issue is not a matter of legitimate public interest. We therefore conclude the State Bar may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with constitutional or common-law privacy.

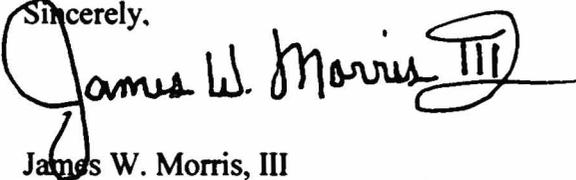
Lastly, section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the Third Court of Appeals ruled the privacy test under section 552.102(a) was the same as the privacy test under section 552.101 of the Government Code and *Industrial Foundation*. The Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a), however, and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. See *id.* at 348. Thus, because none of the submitted information falls within the scope of section 552.102(a) of the Government Code, the State Bar may not withhold any of the information at issue on that

basis. Therefore, as the State Bar does not claim an exception to disclosure, the submitted information must be released to the requestor in its entirety.

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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large, looped initial "J" and a distinct "III" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 466117

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Mr. Mario E. Gutierrez
12405 Sun Terrace Avenue
El Paso, Texas 79938
(w/o enclosures)