



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 18, 2004

Sheriff Jim Hodges
Refugio County
P.O. Drawer 1022
Refugio, Texas 78377

OR2004-4995

Dear Sheriff Hodges:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203565.

The Refugio County Sheriff (the "sheriff's office") received a request from a former employee for (1) the former employee's entire personnel file and (2) information relating to an allegation made against the former employee. You inform us that some of the requested information has been provided to the requestor. You claim that the rest of the requested information is excepted from disclosure under sections 552.101, 552.1175, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common-law right to privacy addressed in *Industrial Foundation* to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. See 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the

disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See also* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

In this instance, the submitted information relates to an investigation that involves allegations of sexual harassment. We agree that *Morales v. Ellen* is applicable to this information. We note, however, that the information at issue does not include an adequate summary of the investigation. Therefore, all of the information that relates to the investigation is subject to disclosure under *Ellen*, except for those portions of the information that reveal the identities of the victims and witnesses. You must withhold that information, which we have marked, under section 552.101 in conjunction with common-law privacy under *Ellen*.

The common-law right to privacy also protects the types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d 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 since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We have marked several items of private information that you must withhold under section 552.101 in conjunction with *Industrial Foundation*.

Next, we address your other privacy claim under section 552.101. You inform us that the submitted information identifies employees of the sheriff's office who were not found to be guilty of allegations made against them. You believe that the identities of these employees may be protected by the doctrine of false light privacy. We note, however, that false light privacy is not an actionable tort in the State of Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d

577, 579 (Tex. 1994). Therefore, a governmental body may not withhold information from disclosure merely because its release might place an individual in a false light. *See* Open Records Decision No. 579 (1990). We also note that the remaining information relates to the conduct of sheriff's office employees in the workplace. As this office has often stated, the public has a legitimate interest in information that relates to public employees and their employment-related behavior. Thus, such information is not private under section 552.101. We therefore conclude that you may not withhold any of the remaining information under section 552.101. *See* Open Records Decision Nos. 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 444 at 4 (1986) (public employee's personnel file information will generally be available to public regardless of whether it is highly intimate or embarrassing), 470 at 4 (1987) (public employee's job performance does not generally constitute private affairs), 473 at 3 (1987) (fact that public employee receives less than perfect or even very bad evaluation not protected by common-law privacy), 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate public concern).

Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked the family member information of individuals whose identities are not private under section 552.101. To the extent that the marked information relates to a peace officer, any such information must be withheld from disclosure under section 552.117(a)(2).

To the extent that the marked family member information does not relate to a peace officer, it may be excepted from disclosure under section 552.117(a)(1). The home address and telephone number, social security number, and family member information of a current or former employee of a governmental body are excepted from disclosure under section 552.117(a)(1) if the current or former employee timely requested confidentiality for the information under section 552.024. The determination of 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). Therefore, you may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of your receipt of the request for the information. You may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely request for confidentiality under section 552.024. Thus, to the extent that the marked family member information relates to a current or former employee of the sheriff's office who is not a peace officer and who timely requested confidentiality for the information under section 552.024, any such information must be withheld under section 552.117(a)(1).

To the extent that the marked family member information relates to a county jailer, as defined by section 1701.001 of the Occupations Code, the information may be excepted from disclosure under section 552.1175. *See* Gov't Code § 552.1175(a)(2). Section 552.1175(b) provides as follows:

Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(b). Thus, to the extent that the marked family member information relates to a county jailer who elected to restrict access to the information in accordance with section 552.1175, any such information is excepted from disclosure under section 552.1175.¹

Lastly, we address your claim under section 552.130. This section excepts from disclosure information that relates to “a motor vehicle operator’s or driver’s license or permit issued by an agency of this state[.]” Gov’t Code § 552.130(a)(1). Section 552.130(a)(1) is applicable to information that relates to a Texas driver’s license number. As the rest of the submitted information does not include any Texas driver’s license information, none of the remaining information is excepted from disclosure under section 552.130.

In summary: (1) you must withhold the marked information that is protected by common-law privacy under section 552.101 in conjunction with *Morales v. Ellen*; (2) you also must withhold the marked information that is private under section 552.101 in conjunction with *Industrial Foundation*; (3) you must withhold the marked family member information under section 552.117(a)(2), to the extent that the information relates to a peace officer; (4) to the extent that the family member information relates to a current or former employee of the

¹We note that the requestor has a special right of access to information about himself that would be excepted from public disclosure on privacy grounds. Information that implicates the requestor’s privacy interests may not be withheld from him under sections 552.117 or 552.1175. *See* Gov’t Code § 552.023(a) (person or person’s authorized representative has special right of access, beyond right of general public, to information relating to person that is protected from public disclosure by laws intended to protect person’s privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should you receive another request for this same information from a person who would not have a special right of access to it, you should resubmit this same information and request another decision. *See* Gov’t Code §§ 552.301, .302; Open Records Decision No. 673 (2001).

sheriff's office who is not a peace officer, the information may be excepted from disclosure under section 552.117(a)(1); and (5) to the extent that the family member information relates to a county jailer, it may be excepted from disclosure under section 552.1175. The submitted information that is not excepted from disclosure under sections 552.101, 552.117, or 552.1175 must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

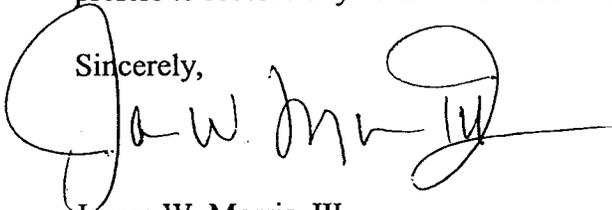
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

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

JWM/sdk

Ref: ID# 203565

Enc: Submitted documents

c: Mr. Robert L. Vega
P.O. Box 1006
Woodsboro, Texas 78393
(w/o enclosures)