



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 28, 2009

Ms. Jennifer Tharp
Chief Civil Prosecutor
Comal County
150 North Seguin Avenue, Suite 314
New Braunfels, Texas 78130

OR2009-17346A

Dear Ms. Tharp:

This office issued Open Records Letter No. 2009-17346 (2009) on December 8, 2009. In that ruling, we incorrectly concluded that the Comal County Sheriff's Office (the "sheriff") failed to meet its procedural obligations under section 552.301 of the Government Code. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2009-17346. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")). This ruling was assigned ID# 371468.

The sheriff received a request for four categories of information pertaining to wrecker and towing services, any recorded conversations between a named individual and the Comal County Telecommunications dispatch, and information pertaining to a named police sergeant. You state you will release most of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and

552.102 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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. Section 552.102(a) of the Government Code excepts from public 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). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

Common-law privacy protects information that (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 and 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. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Furthermore, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and 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

¹Although you initially also raise sections 552.103 through 552.148 as exceptions to disclosure of the submitted information, you have provided no arguments regarding the applicability of these sections; thus, we assume that you no longer raise them. *See* Gov't Code §§ 552.301(b), (e), .302. Furthermore, although you initially claimed that the submitted information is not subject to the Act under section 552.002, you have provided no arguments to support this assertion. Therefore, we will not address your argument under section 552.002. *See id.*

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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).

You claim the submitted information is excepted from disclosure under common-law privacy based on the ruling in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In this decision, the court held that the identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and the public did not have a legitimate interest in such information. *Id.* However, upon review, we find the sheriff did not conduct a sexual harassment investigation or receive a sexual harassment complaint. Therefore, we find that *Ellen* is not applicable in this instance. However, we find that a portion of the submitted information, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the sheriff must withhold the information we have marked under common-law privacy. The sheriff has failed to demonstrate how any of the remaining information is highly intimate or embarrassing or not of legitimate public concern. Therefore, the sheriff may not withhold any of the remaining information under common-law privacy or section 552.102.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; see *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). Upon review, we find the sheriff has failed to demonstrate how any of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Thus, none of the remaining information may be withheld under section 552.101 on that basis.

We note some of the submitted information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer requested confidentiality under section 552.024 or section 552.1175 of the Government Code. See Gov't Code § 552.117(a)(2). We note that section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. See Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). The sheriff must withhold the information we have marked that pertains to currently licensed peace officers

under section 552.117(a)(2) of the Government Code. In this instance, portions of the information we have marked concerns officers who are no longer employed by the sheriff, and it is unclear whether these individuals are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, to the extent the individuals whose information is at issue are licensed peace officers as defined by article 2.12, the sheriff must withhold their personal information, which we have marked, under section 552.117(a)(2) of the Government Code.

If the former officers whose information is at issue are no longer licensed peace officers, then their personal information may be excepted from disclosure under section 552.117(a)(1). Section 552.117(a)(1) excepts from disclosure information related to the current or former officials or employees of a governmental body who are not licensed peace officers. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Accordingly, to the extent that the employees to whom this information pertains timely elected confidentiality under section 552.024, the sheriff must withhold the remaining personal information we have marked under section 552.117(a)(1).³

Next, we note some of the remaining information is confidential under section 552.130 of the Government Code. Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, the sheriff must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

We note the remaining information contains information excepted from disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purposes of communicating electronically with a governmental body," unless the member of the public consents to its release, or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137 (a)-(c). We have marked e-mail addresses in the remaining information that are not of a type specifically excluded by subsection (c). Accordingly, the sheriff must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.

³Regardless of the applicability of section 552.117, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

In summary, the sheriff must withhold the information we have marked under sections 552.101 and 552.102 in conjunction with common-law privacy. To the extent the individuals whose information is at issue are licensed peace officers as defined by article 2.12, the sheriff must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code. The remaining information we have marked pertaining to officers no longer employed by the sheriff must also be withheld under section 552.117(a)(1) to the extent that the employees to whom this information pertains timely elected confidentiality under section 552.024. The sheriff must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code, as well as the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.⁴ The remaining information must be released to the requestor.

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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/sdk

Ref: ID# 371468

c: Requestor

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number, a copy of a Texas driver's license, and a Texas license plate number under section 552.130 of the Government Code, as well as an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.