



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2010

Mr. Carey E. Smith
General Counsel
Texas Health & Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2010-08109

Dear Ms. Smith:

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# 381905.

The Health & Human Services Commission (the "commission") received a request for all documents related to the civil rights investigation of a named individual and the Medically Dependant Children Program. You claim the submitted information is 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.

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. This section encompasses common-law privacy, which 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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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).

The submitted information relates to an investigation into allegations of sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. See *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* The *Ellen* court held that "the public did 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 sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but the identities of the victims and witnesses must generally be redacted and their detailed statements must be withheld from disclosure. See Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. Because 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, the identity of the individual accused of sexual harassment is not protected from public disclosure. See *Ellen*, 840 S.W.2d at 525; Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Upon review, we find the submitted information contains an adequate summary of the investigation. Therefore, with the exception of the marked summary, the commission must withhold the submitted information under section 552.101 in conjunction with common-law privacy under *Ellen*.¹ Although the summary is not confidential in its entirety under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, any information within the summary that identifies alleged victims or witnesses is confidential and must be withheld. See *Ellen*, 840 S.W.2d at 525. Upon review, we marked the information in the adequate summary that identifies witnesses and victims of the alleged harassment. This marked information must be withheld under section 552.101 in conjunction with common-law privacy.

¹As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

Section 552.101 also encompasses information made confidential by other statutes, such as section 12.003 of the Human Resources Code. Section 12.003 provides in relevant part:

(a) Except for purposes directly connected with the administration of the [commission's] assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the [commission] or acquired by employees of the [commission] in the performance of their official duties.

Hum. Res. Code § 12.003(a); *see also id.* § 21.012 (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs).² In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of [DHS] clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” ORD 584 at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. *See also* 42 U.S.C. § 1396a(a)(7) (state plan for medical assistance must provide safeguards that restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with administration of plan); 42 C.F.R. §§ 431.300 *et seq.*; Hum. Res. Code § 21.012(a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs); Open Records Decision No. 166 (1977).

You seek to withhold any portions of the remaining information that identify persons who have applied for or are receiving assistance from assistance programs administered by any of Texas’ Health and Human Services agencies. However, the remaining portions of the marked investigation summary do not identify any such individuals. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code.

You also raise section 552.117 of the Government Code. This section excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a

²We note the former Texas Department of Human Services (“DHS”) ceased operations on September 1, 2004, and the Texas Health and Human Services Commission now administers the Medicaid program formerly administered by DHS. *See* Health and Human Services Commission website at <http://www.hhsc.state.tx.us>; Act of June 2, 2003, 78th Leg., R.S., ch. 198, 2003 Tex. Gen. Laws 611.

governmental body who timely request that such information be kept confidential under section 552.024. 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 commission may only withhold information under section 552.117(a)(1) on behalf of officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We marked the information in the investigative summary that may be subject to section 552.117(a)(1). The commission must withhold this marked information if the employee whose information we marked properly elected to keep this information confidential pursuant to section 552.024. Otherwise, the marked information must be released.

In summary, with the exception of the marked investigation summary, the commission must withhold the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The commission must withhold the information we marked in the investigation summary under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The commission must also withhold the information we marked under section 552.117(a)(1) of the Government Code if the individual whose information we marked timely elected to keep this information confidential. The remaining portions of the marked investigation summary must be released.

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

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Enc. Submitted documents

cc: Requestor
(w/o enclosures)