



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2011

Ms. Katie Lentz
Open Records
William County Sheriff's Office
508 South Rock Street
Georgetown, Texas 78626

OR2011-08022

Dear Ms. Lentz:

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# 420175.

The Williamson County Sheriff's Office (the "sheriff") received a request for all records related to three named employees of the sheriff. You claim the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.137 of the Government Code.¹ We have considered the claimed exceptions 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. This section encompasses information made confidential by other statutes, such as section 1703.306 of the Occupations Code, which provides in relevant part:

¹ Although you also raise section 552.1175 of the Government Code, section 552.117 is the proper exception to raise for information the sheriff holds in its capacity as an employer.

² We assume 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 those records contain substantially different types of information than that submitted to this office.

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a)-(b). You have marked polygraph examination reports and information you state was acquired from such reports. It does not appear the requestor falls into any of the categories of individuals authorized to receive the polygraph information under section 1703.306(a). Upon review, we find most of this information, which we have marked, is subject to section 1703.306. However, you have not demonstrated how the remaining information was acquired from a polygraph examination. Therefore, the sheriff may not withhold this information on that basis. The sheriff must withhold the information we have marked under section 552.101 of the Government Code in conjunction with 1703.306 of the Occupations Code. We note in addition to the interview transcripts we have marked, this information is found in the submitted audio recordings of those interviews. You state the sheriff does not have the capability to redact information from the recordings. Therefore, sheriff must withhold the submitted audio recordings in their entirety.³

Section 552.101 also encompasses the common-law right to 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be met.

³ Because our ruling as to this information is dispositive, we do not address your remaining arguments against disclosure of the audio recordings and portions of the written information.

Id. at 681-82. You contend the information you have marked is protected by common-law privacy on the basis of *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of 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. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "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 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 Open Records Decision Nos. 393 (1983), 339 (1982). We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. Further, since 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 Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

In this instance, the submitted information consists of documents pertaining to two investigations. One of these reports, No. 10-013, concerns an investigation into alleged sexual harassment. The document submitted regarding this investigation constitutes an adequate summary. This document is not confidential under common-law privacy; however, the information we have marked within this document identifying the victim of the alleged harassment is confidential under common-law privacy and must be withheld under section 552.101. The remaining report, No. 2009-060, concerns an investigation into allegations that an employee provided false information in violation of the sheriff's rules of conduct. This is not an investigation of alleged sexual harassment and no part of this report may be withheld under section 552.101 in conjunction with common-law privacy on the basis of the court's holding in *Ellen*.

However, we note common-law privacy also protects the types of information 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). We find the information we have marked in report no. 2009-060 is intimate or embarrassing and of no legitimate public interest. The sheriff must withhold this information under section 552.101 in conjunction with common-law privacy.

We note the submitted information contains employees' dates of birth. 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."⁴ Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a).⁵

Section 552.117 of the Government Code provides in relevant part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to the home address, home telephone number, or social security number of the following person or that reveals whether the person has family members:

- (1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024;
- (2) a peace officer as defined by Article 2.12, Code of Criminal Procedure . . . regardless of whether the officer complies with Section 552.024 or 552.1175, as applicable[.]

Gov't Code § 552.117(a)(1)-(2). We have marked the information that is subject to this section.

Section 552.117(a)(2) applies to the personal information of peace officers as defined by article 2.12 of the Code of Criminal Procedure. It is unclear whether some of the individuals whose information is at issue are licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, to the extent an individual at issue is a licensed peace officer, the sheriff must withhold that individual's information we have marked under section 552.117(a)(2) of the Government Code.

However, if an individual at issue is not a licensed peace officer, then that individual's personal information is subject to section 552.117(a)(1) of the Government Code.

⁴ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵ Because our ruling as to this information is dispositive, we do not address your remaining argument against its disclosure.

Section 552.117(a)(1) of the Government Code exempts from disclosure the personal 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 id.* §§ 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. Thus, to the extent an individual whose personal information is at issue timely requested confidentiality under section 552.024, the sheriff must withhold such individual's information we have marked under section 552.117(a)(1). Conversely, to the extent an individual did not make a timely election under section 552.024, the sheriff may not withhold such information under section 552.117(a)(1).⁶

Finally, you raise section 552.137 of the Government Code. Section 552.137 exempts from disclosure "an e-mail address of a member of the public that is provided for the purpose 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). *See* Gov't Code § 552.137(a)-(c). The e-mail address we have marked is not of a type specifically excluded by section 552.137(c). Accordingly, the sheriff must withhold the e-mail address we have marked under section 552.137, unless its owner has affirmatively consented to disclosure.⁷

In summary, the sheriff must withhold the information we have marked (1) under section 552.101 in conjunction with section 1703.306 of the Occupations Code, (2) in report no. 10-013 under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, (3) in report no. 2009-060 under section 552.101 in conjunction with common-law privacy, (4) under section 552.102(a), (5) under section 552.117(a)(2), to the extent the individuals at issue are licensed peace officers, (6) under section 552.117(a)(1), to the extent the individuals at issue are not licensed peace officers and made timely elections under section 552.024, and (7) under section 552.137, unless the owner of the e-mail address at issue has affirmatively consented to release. The remaining information must be released to the requestor.

⁶ We note that regardless of whether a timely confidentiality election was made pursuant to section 552.024, section 552.147(b) authorizes a governmental body to redact a living person's social security number without requesting an opinion from this office. *See* Gov't Code § 552.147(b).

⁷ We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including 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.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/bs

Ref: ID # 420175

Enc. Submitted documents

c: Requestor
(w/o enclosures)