



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 16, 2011

Ms. Susan Fillion  
Assistant County Attorney  
Harris County  
1019 Congress, 15th Floor  
Houston, Texas 77002

OR2011-08562

Dear Ms. Fillion:

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# 420822 (C.A. File No. 11PIA0127).

The Harris County Constable Precinct 1 (the "constable") received a request for twenty-three categories of information relating to a specified grievance, several named employees, and procedures. You state you have no information pertaining to portions of the requested information.<sup>1</sup> You state you have released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.122, 552.130, and 552.151 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the constable sought clarification with respect to portions of the request for information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Although you also raise section 552.1175, we note that section 552.117 is the correct exception to raise for information the constable holds in an employment capacity.

request may be properly narrowed). You have not informed us whether the constable received clarification of the portions of the request at issue. Thus, for the portions of the requested information for which you have not received clarification, we find the constable is not required to release information in response to those portions of the request. However, if the requestor clarifies those portions of the request for information, the constable must seek a ruling from this office before withholding any responsive information from the requestor. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010).

Next, we must address the constable's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See Gov't Code* § 552.301(b). Pursuant to section 552.301(e), the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The constable states it received the request for information on March 24, 2011. Accordingly, we find the constable's ten- and fifteen-business-day deadlines were April 7, 2011 and April 14, 2011, respectively. However, you did not request a ruling from this office until April 12, 2011, and you did not submit the responsive information until April 19, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the constable failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of the Act results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third party interests. *See* ORD 630. Although the constable claims exceptions to disclosure under sections 552.103 and 552.122 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decisions Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5

(1999) (waiver of discretionary exceptions). Consequently, the constable may not withhold any of the submitted information pursuant to section 552.103 or section 552.122 of the Government Code. However, because sections 552.101, 552.102, 552.117, 552.130, and 552.151 of the Government Code can provide compelling reasons to withhold information, we will consider the applicability of these exceptions to 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. Section 552.101 encompasses the doctrine of common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or 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 also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision Nos. 600 (1992) (identifying public and private portions of certain state personnel records), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 523 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), 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. *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.* In concluding, 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 alleged sexual harassment, the investigation summary must be released along with the statement of the accused 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). 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. We note that 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).

We note a portion of the submitted information pertains to investigations of sexual harassment. Furthermore, we find this information does not contain an adequate summary of the sexual harassment investigations. Because there is no adequate summary of the investigations, any information pertaining to the sexual harassment investigations must generally be released. However, the information at issue contains the identity of the alleged sexual harassment victims. Accordingly, we conclude the constable must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. However, none of the remaining information pertains to a sexual harassment investigation, and the constable may not withhold any of the remaining information on that basis. We also find that portions of the remaining information are highly intimate or embarrassing and not of legitimate public interest. Therefore, the constable must also withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, you have failed to demonstrate any portion of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

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). 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) of the Government Code. However, the remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. It is unclear whether the individuals whose personal information is at issue are currently licensed peace

officers, as defined by article 2.12 of the Code of Criminal Procedure. Therefore, to the extent the individuals at issue are licensed peace officers, then the constable must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

If the individuals at issue are not licensed peace officers, then the personal information at issue may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member 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. To the extent the individuals whose personal information is at issue timely requested confidentiality under section 552.024, the constable must withhold the information we have marked under section 552.117(a)(1). Conversely, to the extent these individuals did not make timely elections under section 552.024, the constable may not withhold the marked information under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license or driver's license issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1). Thus, the constable must withhold the Texas driver's license number we have marked under section 552.130 of the Government Code.<sup>3</sup>

Section 552.151 of the Government Code provides as follows:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

*Id.* § 552.151. You assert that release of the "Request for Approval of Other Employment" forms would subject a named deputy to an imminent threat of physical danger and bodily harm as the public would have information about his location and whereabouts. Upon review, however, we find you have not demonstrated how release of these forms, which

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<sup>3</sup>We note this office 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 under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

pertain to outside employment occurring in the past or outside employment occurring on an "as needed" basis, would subject the deputy at issue to a substantial threat of physical harm. Accordingly, the constable may not withhold any of the remaining information at issue under section 552.151 of the Government Code.

In summary, the constable must withhold the information we have marked under (1) section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*, (2) section 552.101 of the Government Code in conjunction with common-law privacy, and (3) section 552.102(a) of the Government Code. To the extent the individuals at issue are licensed peace officers, the constable must withhold the information we have marked under section 552.117(a)(2) of the Government Code. If the individuals at issue are not licensed peace officers, then to the extent the individuals timely requested confidentiality under section 552.024 of the Government Code, the constable must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The constable must withhold the Texas driver's license number we have marked under section 552.130 of the Government Code. The remaining information must be released.<sup>4</sup>

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](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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

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<sup>4</sup>We note the requestor has a special right of access to some of the information being released in this instance. See Gov't Code § 552.023. Because such information is confidential with respect to the general public, if the constable receives another request for this information from a different requestor, then the constable should again seek a ruling from this office.

Ref: ID# 420822

Enc. Submitted documents

c: Requestor  
(w/o enclosures)