



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 2, 2011

Ms. Barbara Corley
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2011-12771

Dear Ms. Corley:

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# 428795.

The Texas Department of Criminal Justice (the "department") received a request for four categories of information from the requestor's personnel file. You state some of the information has been or will be released. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.134 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. Section 552.101 encompasses the doctrine of common-law 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 established. *Id.* at 681–82. 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 the files of a sexual harassment investigation. 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. 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 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). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. We also note privacy principles do not apply when a person requests information concerning herself. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves).

You state the submitted information relates to investigations of alleged sexual harassment. Upon review, we find a portion of the information consists of an adequate summary of one of the investigations and a statement by the accused party. Therefore, as to this investigation, and pursuant to section 552.101 and the ruling in *Ellen*, the summary and the statement by the accused are not protected by common-law privacy, but any information in the summary and statement that identifies the alleged victim and non-supervisory witnesses is confidential under common-law privacy and must be withheld. *See Ellen*, 840 S.W.2d at 525. In this case, however, the requestor is the named victim. Therefore, any information that identifies the requestor may not be withheld from her on the basis of common-law privacy. *See* Gov't Code § 552.023; ORD 481 at 4. Thus, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the court's ruling in *Ellen*.¹

The requested information concerning the other investigation, however, does not contain an adequate summary of the investigation. Therefore, pursuant to section 552.101 and the ruling in *Ellen*, the identities of the victims and witnesses are confidential under section 552.101 of the Government Code in conjunction with common-law privacy, but the remaining information is not confidential on that basis. *See Ellen*, 840 S.W.2d at 525. Thus,

¹As our ruling is dispositive, we do not address your argument under section 552.107 of the Government Code for this information.

the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*.

Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”² 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 find the department must withhold the information we have marked under section 552.102 of the Government Code.

Section 552.117(a)(3) excepts from public disclosure the present and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of the department or the predecessor in function of the department or any division of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)); *see* Open Records Letter No. 2005-01067 (authorizing the department to withhold certain information under section 552.117(a)(3) without the necessity of requesting a decision from this office under the Act). The department must withhold the information we have marked under section 552.117(a)(3) of the Government Code.

Section 552.134 encompasses information relating to inmates of the department and provides, in part:

- (a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov’t Code § 552.134(a). Upon review, we find the information we have marked concerns an individual confined as an inmate in a facility operated by the department. We find the exceptions in section 552.029 are not applicable in this instance. Therefore, the department must withhold the information we have marked under section 552.134(a) of the Government Code. However, you have not demonstrated how the remaining information concerns an individual confined as an inmate in a facility operated by the department. Accordingly, the department may not withhold any of the remaining information under section 552.134 of the Government Code.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the court's ruling in *Ellen* and the information we have marked under sections 552.102, 552.117(a)(3), and 552.134 of the Government Code. The remaining information must be released.³

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/agn

Ref: ID# 428795

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the remaining information contains a social security number. Section 552.147 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. *See* Gov't Code § 552.147(b).