



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2011

Mr. James R. Evans, Jr.
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Austin, Texas 78735

OR2011-18242

Dear Mr. Evans:

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# 438567.

The Cameron County Appraisal District (the "district"), which you represent, received a request for the requestor's personnel file. You state you have released some of the requested information. 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 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

¹Although you raise section 552.111 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that this section applies to the submitted information. See Gov't Code §§ 552.301(b), (e), .302. Furthermore, although you raise section 552.022 of the Government Code as an exception to disclosure, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are confidential under other law. See *id.* § 552.022.

(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. Furthermore, we note supervisors are generally not witnesses for purposes of *Ellen*, and their identities may not be withheld under section 552.101 on that basis.

The information you have submitted as Exhibit B-1 relates to an investigation of alleged sexual harassment. You argue the information must be withheld in full. However, we find this information does not contain an adequate summary of the investigation. Therefore, pursuant to section 552.101 and the ruling in *Ellen*, the information generally must be released, with the identities of the victims and witnesses redacted under section 552.101 of the Government Code in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. However, we note because the requestor is the alleged victim, he has a right of access to his own identifying information, and this information may not be withheld from him. *See* Gov’t Code § 552.023 (person has special right of access to information excepted from public disclosure under laws intended to protect person’s privacy interest as subject of the information); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when person asks governmental body for information concerning the person himself or herself). Further, 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* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). Accordingly, the district must withhold the information identifying witnesses we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. None of the remaining information in Exhibit B-1 may be withheld on the basis of common-law privacy.

You also contend the information in Exhibit B-2 pertains to sexual harassment and therefore is confidential under common-law privacy. However, Exhibit B-2 consists of an investigation into employees gambling, not sexual harassment. Because the allegation does not concern sexual harassment, we find *Ellen* is not applicable in this instance. Consequently, the district may not withhold any portion of Exhibit B-2 under section 552.101 in conjunction with common-law privacy on the basis of *Ellen*. Furthermore, upon review, we find none of Exhibit B-2 is highly intimate or embarrassing. Therefore, the district may not withhold any portion of Exhibit B-2 under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. Open Records Decision No. 515 at 3 (1988). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). However, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You state the information at issue identifies witnesses, whose identities you claim should be protected by to the informer's privilege. However, as noted above, the informer's privilege does not protect individuals who merely provide information in the course of an investigation, and you do not identify any individual who initially reported the violation of law at issue. We therefore conclude the district has failed to demonstrate the applicability of the common-law informer's privilege to the submitted information. Thus, the district may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with the informer's privilege.

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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation*

privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at *5 (Tex. Dec. 3, 2010). The court then considered the applicability of section 552.102, and 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. *Id.* at *10. Upon review, we find no portion of Exhibits B-1 and B-2 is excepted under section 552.102(a). Accordingly, the district may not withhold any of the information at issue under section 552.102(a) of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 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)). 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 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 at issue timely requested confidentiality under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the district may not withhold the marked information under section 552.117(a)(1).

In summary, the district 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*. To the extent the individuals at issue timely requested confidentiality under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information must be released.³

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We 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 district receives another request for this information from a different requestor, then the district should again seek a ruling from this office.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/ag

Ref: ID# 438567

Enc. Submitted documents

cc: Requestor
(w/o enclosures)