



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 2, 2013

Mr. Scott McDonald
Counsel for the Hidalgo Independent School District
O'Hanlon, McCollom & Demerath
808 West Avenue
Austin, Texas 78701

OR2013-17179

Dear Mr. McDonald:

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# 501093.

The Hidalgo Independent School District (the "district"), which you represent, received a request for a specified settlement agreement, records showing any payment pursuant to the settlement agreement, and all records showing any complaints or grievances filed by a named individual against the district, district employees, or the district's board of trustees. You state the district has released some of the requested information. You inform us the district will redact certain information pursuant to section 552.147(b) of the Government Code, and a personal e-mail address under section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

¹Section 552.147(b) 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). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain 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.

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 section 551.104 of the Government Code, which provides in part, “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” *Id.* § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov’t Code § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether governmental body may withhold such information under statutory predecessor to Gov’t Code § 552.101). You state the requestor seeks access to the recording of a closed meeting of the district board of trustees. Based on your representations, we conclude the district must withhold the recording at issue under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.²

Section 552.101 of the Government Code also encompasses the 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 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *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 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 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*, along with the statement of the accused. However,

²Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold certain categories of information without the necessity of requesting an attorney general decision, including a certified agenda and recording of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code, without requesting a decision from this office.

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 victims and witnesses must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, some of the submitted information pertains to a sexual harassment investigation and, thus, is subject to the ruling in *Ellen*. Upon review, we find the investigation includes an adequate summary, as well as a statement of the accused. The summary and statement of the accused are not confidential under section 552.101 in conjunction with common-law privacy. However, information within the summary and the accused's statement that identifies the victim and witnesses, which we have marked, is confidential and must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. The remaining information within the summary and statement of the accused is not subject to common-law privacy and may not be withheld under section 552.101 on that basis. However, the district must withhold the remaining information in this sexual harassment investigation, which we have marked, under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

Common-law privacy under section 552.101 of the Government Code also encompasses the specific types of information the Texas Supreme Court delineated in *Industrial Foundation*. *See* 540 S.W.2d at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. (1987). This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). This office has also determined that a public employee's net pay is protected by common-law privacy even though it involves a financial transaction between the employee and the governmental body. *See* Attorney General Opinion GA-0572 at 3-5 (2007) (stating that net salary necessarily involves disclosure of information about personal financial decisions and is background financial information about a given individual that is not of legitimate public concern to the public). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (1990)

(financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy).

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the district must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, no portion of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses federal law such as the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

[r]ecords and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find the information we have marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA apply to this information. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 of the Government Code also encompasses the Americans with Disabilities Act of 1990 (the "ADA"). *See* 42 U.S.C. § 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination" conducted to determine whether an employee is still able to perform the essential functions of his or her job is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Upon review, we conclude some of the remaining information, which we have marked, is confidential under the ADA. Accordingly, the district must withhold the marked information under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records

Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find some of the remaining information, which we have marked, constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. Accordingly, the district must withhold the marked medical records under section 552.101 of the Government Code in conjunction with the MPA.

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 or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(a)(1)*. 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 be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, if 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 (1) the responsive recording of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code; (2) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*; (3) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (4) the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA; (5) the information we have marked under section 552.101 of the Government Code in conjunction with the ADA; (6) the information we have marked under section 552.101 of the Government Code in conjunction with the MPA; and (7) the information we have marked under section 552.117(a)(1) of the Government Code, if the individuals at issue timely requested confidentiality under section 552.024 of the Government Code. The remaining information 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/ac

Ref: ID# 501093

Enc. Submitted documents

c: Requestor
(w/o enclosures)