



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2014

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2014-16801

Dear Ms. Parker:

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# 539619.

The Texas Department of Transportation (the "department") received a request for information pertaining to the termination of the requestor and the personnel file of a named employee. The department states it will withhold information under sections 552.024 and 552.130 of the Government Code and Open Records Decision No. 684 (2009).¹ The department states it will release some of the requested information, but claims some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107,

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specified categories of information without the necessity of requesting an attorney general decision.

552.116, and 552.139 of the Government Code. 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 protected by other statutes, including the Americans with Disabilities Act of 1990 (the “ADA”), 42 U.S.C. §§ 12101-12213. The ADA provides a covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of the applicant and may condition an offer of employment on the results of the examination, provided 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. *See* 42 U.S.C. § 12112(d)(3)(B); *see also* 29 C.F.R. § 1630.14(b); Open Records Decision No. 641 (1996). Thus, the department must withhold the physical examination record we have marked under section 552.101 of the Government Code in conjunction with the ADA.³

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990).

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. *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

²We 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.

³As our ruling is dispositive, we do not address your other argument to withhold this information.

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, 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. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Exhibit D contains an adequate summary of an investigation into alleged sexual harassment. The summary is, thus, not confidential. However, information within the summary that identifies the victim, which we have marked, is confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. The department must withhold the remaining information in Exhibit D, which we have also marked, under section 552.101 in conjunction with common-law privacy. *See id.* We agree the information you have marked under common-law privacy in Exhibit E also satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. We have also marked information in Exhibit E that is confidential under common-law privacy. Accordingly, the department must withhold the information in Exhibit E marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov’t Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this

office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a confidential communication, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You explain Exhibit B constitutes confidential communications between attorneys for and employees of the department that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. Based on these representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit B. Therefore, the department may withhold Exhibit B under section 552.107(1) of the Government Code.

Section 552.116 of the Government Code provides the following:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution

or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state Exhibit C consists of audit working papers prepared and maintained by the department's internal auditor in conjunction with a formal investigation audit into specified acts and allegations of impropriety, malfeasance, or nonfeasance in the obligation, expenditure, receipt, or use of state funds. You inform us the audit is authorized by chapter 321 of the Government Code. *See* Transp. Code § 201.108 (Texas Transportation Commission shall appoint internal auditor for department); *see also* Gov't Codes §§ 321.0131-.0134 (defining various types of audits), .0136, 21.007 (relating to duties of the internal auditor). Upon review, we agree section 552.116 is applicable to Exhibit C. Therefore, the department may withhold Exhibit C under section 552.116 of the Government Code.⁴

Section 552.139(b)(3) of the Government Code provides, "a photocopy or other copy of an identification badge issued to an official or employee of a governmental body" is confidential. Gov't Code § 552.139(b)(3). We agree the department must withhold the information you have marked under section 552.139(b)(3) of the Government Code.⁵

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." Gov't Code § 552.102(a). The Texas Supreme Court has 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.*, 354 S.W.3d 336 (Tex. 2010). We agree the department must withhold the information you have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code may be applicable to some of the remaining information in Exhibit D. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government

⁴The department indicates it released a copy of the final audit to the requestor.

⁵As our ruling is dispositive, we do not address your other argument to withhold this information.

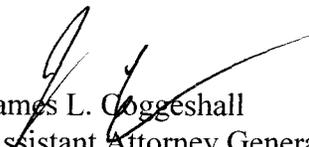
Code. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Such information may not be withheld for an individual who did not make a timely election. We have marked information in Exhibit D that the department must withhold if section 552.117(a)(1) applies.

To conclude, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA. The department must also withhold the information we have marked in Exhibits D and E, as well as the information you have marked in Exhibit E, under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the information you have marked under sections 552.102 and 552.139(b)(3) of the Government Code. The department must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employee at issue made a request for confidentiality under section 552.024 of the Government Code before the request for information was made. The department may withhold Exhibit B under section 552.107(1) of the Government Code and Exhibit C under section 552.116 of the Government Code. The department must release the remaining information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/cbz

Ref: ID# 539619

Enc. Submitted documents

c: Requestor
(w/o enclosures)