



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 23, 2016

Mr. Jonathan L. Almanza
Assistant District Attorney
Hidalgo County Criminal District Attorney's Office
100 North Clossner, Room 303
Edinburg, Texas 78539

OR2016-19032

Dear Mr. Almanza:

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# 623758 (Hidalgo Co. Ref. No. 2016-0076-DA.SO).

The Hidalgo County Sheriff's Office (the "sheriff's office") received a request for information documenting complaints against a named individual. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you provide documentation showing you have notified an interested third party of the right to submit comments to this office as to why some of the submitted information should not be released. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released). You have provided comments from the interested third party and we have also received comments from the requestor. We have considered the submitted arguments 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." *Id.* § 552.101. Section 552.101 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 demonstrated. *See id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

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 “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). We note, 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). We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their information appears in a non-supervisory context.

Upon review, we find the submitted information pertains to a sexual harassment investigation and, thus, is subject to the ruling in *Ellen*. Further, we find the submitted information includes an adequate summary of this investigation, as well as a statement by the person accused of sexual harassment. The summary and statement of the accused, which we have indicated, are not confidential under section 552.101 in conjunction with common-law privacy. However, information within the summary and statement identifying the victims and witnesses of the sexual harassment is confidential under common-law privacy and must be withheld. *See Ellen*, 840 S.W.2d at 525. Accordingly, the sheriff's office must withhold the information we have marked in the summary and indicated in the statement that identifies the victims and witnesses under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The remaining information within the summary and statement is not subject to common-law privacy and may not be withheld under section 552.101 of the Government Code on that basis. Thus, the remaining information in the adequate summary and statement of the accused must be released. Because there is an adequate summary, the department must also withhold the remaining submitted information under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

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[.]”¹ Gov’t Code § 552.102(a). The Texas Supreme Court 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). Upon review, we find the sheriff’s office must withhold the date of birth we have marked 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. Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* 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. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We marked information under section 552.117 that consists of the personal information of a peace officer who was employed by the sheriff’s office and the information is held in the employment context. In this instance, however, it is unclear whether the individual whose information is at issue is a currently licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, to the extent the individual whose information is at issue is a currently licensed peace officer as defined by article 2.12, the sheriff’s office must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, to the extent the individual whose information is at issue is no longer a licensed peace officer as defined by article 2.12, then the sheriff’s office may not withhold the marked information under section 552.117(a)(2).

If the information we marked under section 552.117 pertains to an individual who is no longer a licensed peace officer, then the marked information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) 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. *See* Gov’t Code § 552.117(a)(1). As previously noted, section 552.117 also applies to the personal cellular telephone number of a current or former

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* ORD 506 at 5-6. 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 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 who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual at issue is no longer a peace officer as defined by article 2.12 and to the extent the individual timely requested confidentiality under section 552.024 of the Government Code, the sheriff's office must withhold the marked information under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, to the extent the individual at issue is no longer a peace officer as defined by article 2.12 and did not timely request confidentiality under section 552.024, the sheriff's office may not withhold the marked information under section 552.117(a)(1).

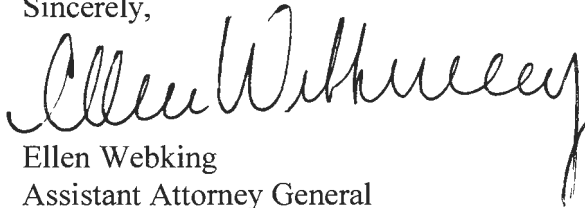
In summary, the sheriff's office must withhold the information we have marked in the summary and indicated the statement of the accused that identifies the victims and witnesses as well as the remaining information other than the summary and statement of the accused under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The sheriff's office must withhold the date of birth we have marked under section 552.102(a) of the Government Code. To the extent the individual whose information is at issue is a currently licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, the sheriff's office must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. To the extent the individual at issue is no longer a peace officer as defined by article 2.12 and to the extent the individual timely requested confidentiality under section 552.024 of the Government Code, the sheriff's office must withhold the marked information under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. The sheriff's office 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,

A handwritten signature in black ink, appearing to read "Ellen Webking". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Ellen Webking
Assistant Attorney General
Open Records Division

EW/bw

Ref: ID# 623758

Enc. Submitted documents

c: Requestor
(w/o enclosures)